

CUSTOMS BULLETIN AND DECISIONS

**Weekly Compilation of
Decisions, Rulings, Regulations, and Notices
Concerning Customs and Related Matters of the
U.S. Customs Service
U.S. Court of Appeals for the Federal Circuit
and
U.S. Court of International Trade**

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This issue contains:

U.S. Customs Service

T.D. 95-87 and 95-88

General Notices

U.S. Court of Appeals for the Federal Circuit

Appeal No. 94-1477, 95-1125, and 95-1134

**DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE**

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 12

(T.D. 95-87)

RIN 1515-AB44

ENFORCEMENT OF ITC EXCLUSION ORDERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations regarding unfair competition to reflect Customs authority to enforce seizure and forfeiture orders issued by the United States International Trade Commission (ITC). These orders would be issued for articles which had previously been denied entry pursuant to an ITC exclusion order. Such seizure and forfeiture orders may be issued only when the owner, importer or consignee of such articles has previously attempted to import articles subject to an exclusion order into the U.S.; the articles have previously been denied entry; and the owner, importer or consignee has been notified in writing of the previous denial of entry. The amendment sets forth the procedures Customs will follow when seizures are made for violations of the ITC exclusion orders. It also describes the appeal rights and procedures available to parties who have an interest in the seized property.

EFFECTIVE DATE: November 27, 1995.

FOR FURTHER INFORMATION CONTACT: Vicki Allums, Intellectual Property Rights Branch, U.S. Customs Service (202) 482-6960.

SUPPLEMENTARY INFORMATION

BACKGROUND

Under § 337 of the Tariff Act of 1930 (19 U.S.C. 1337), the International Trade Commission applies U.S. statutory law and the common law of unfair competition to the importation of products into the United States and their subsequent sale in the United States. Section 337 declares unlawful unfair methods of competition and unfair acts in the

importation and sale of products in the United States, the threat or effect of which is to destroy or substantially injure a domestic industry, prevent establishment of such an industry, or restrain or monopolize trade and commerce in the United States. Section 337 also declares as unlawful per se infringement of a valid and enforceable U.S. patent, copyright, registered trademark, or mask work; no resulting injury need be found. To obtain relief under § 337, the affected U.S. industry must file a complaint with the United States International Trade Commission (ITC). A formal hearing before an administrative law judge will then be conducted in order to determine whether a violation under § 337 exists. The administrative law judge then issues an initial determination. The initial determination is subject to discretionary review by the ITC, which may affirm, reverse, modify, set aside, or remand the initial determination to the administrative law judge for further proceedings. If it is determined that a violation exists, the ITC may order that any articles found to be in violation of the Act be excluded from entry into the U.S.

Section 1342(a)(5)(B) of the Omnibus Trade and Competitiveness Act of 1988 amended § 337 of the Tariff Act by inserting a new subsection (I). That subsection authorizes the ITC to issue an order providing that any article determined to be imported in violation of the provisions of the law relating to unfair methods of competition and unfair acts in the importation of articles into the United States should be seized and forfeited when certain conditions stated in the law have been met. Any such order issued is to be enforced by the Secretary of the Treasury.

For such an order to be valid, the law provides that the following conditions must be met:

- (a) The owner, importer, or consignee of the article must have previously attempted to import the article into the United States;
- (b) The article must have been denied entry into the United States by reason of an order issued under 19 U.S.C. 1337(d); and
- (c) Upon such previous denial of entry, the Secretary of the Treasury must have provided the owner, importer, or consignee of the article with written notice of—
 - (i) such order, and
 - (ii) that seizure and forfeiture would result from any further attempt to import the article into the United States.

Section 12.39, Customs Regulations (19 CFR 12.39) currently describes the role of the ITC in determining whether an importer has engaged in unfair methods of competition or practices, and the actions the ITC can order in response to the finding of such practices. Among those actions are exclusion from entry and entry under bond of articles imported in violation of fair trade provisions, both of which are cited in § 12.39(b). The authority of the ITC to exclude articles from entry into the United States under § 337 is described in § 12.39(b)(1). Section 12.39(b)(2) permits excluded articles to be entered under a single entry bond pending the finalization of the ITC determination. Finally, § 12.39(b)(3) requires, among other things, that district directors notify

each importer or consignee of articles entered under bond pursuant to § 12.39(b)(2) when the determination becomes final, and indicate that the entry of articles is refused.

Customs Notice of Proposed Rulemaking:

On May 19, 1994, Customs published a Notice of Proposed Rulemaking in the Federal Register (59 FR 26151), which solicited comments on a proposal to amend the Customs Regulations so that they would reflect Customs authority to enforce seizure and forfeiture orders issued by the International Trade Commission. No comments were received in response to the NPRM.

However, in its internal review of the proposed rule, Customs identified an inconsistency between the proposal and the statute's legislative history. The legislative history indicates that Congress intended to include "like goods" within the scope of Section 337 seizure orders. The addition of this phrase to the final regulation does not expand the final rule because Customs seizure and forfeiture authority only extends to articles and like articles which fall within the scope of the ITC order. The phrase merely serves to clarify the extent of that authority.

Summary of Amendment:

This document amends § 12.39(b), Customs Regulations (19 CFR 12.39(b)) to reflect both the authority of the ITC to issue seizure and forfeiture orders against articles and like articles for which exclusion orders have been issued under certain conditions and the authority of the Secretary of the Treasury to enforce those orders.

The amendment also sets forth the procedures that Customs, on behalf of the Secretary of the Treasury, will follow when enforcing the order. The procedures provide that when the three statutory conditions are met that allow the ITC to issue a seizure and forfeiture order, and the ITC notifies the Secretary of the Treasury of the issuance of such order, Customs will notify all ports of entry of the order and identify both the article subject to the order and the owners, importers or consignees who are subject to the order.

These seizure orders would be issued by the ITC against specific importers, or their agents and consignees, and would apply only to articles and like articles which have been denied entry by reason of an exclusion order, and for which the importer has been notified in writing.

The amendment also contains procedures that are to be followed by parties having an interest in articles which are seized pursuant to ITC seizure orders and who wish to file a petition for relief.

REGULATORY FLEXIBILITY ACT

For the reasons set forth in the preamble, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), it is certified that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12866

This amendment does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 12

Customs duties and inspection, Imports.

AMENDMENT TO THE REGULATIONS

Accordingly, Part 12, Customs Regulations (19 CFR Part 12), is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The general and relevant specific authority citations for Part 12 continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * *

Section 12.39 also issued under 19 U.S.C. 1337, 1623;

* * * * *

2. Section 12.39 is amended by revising the heading of paragraph (b); by inserting a new subparagraph (b)(4); by redesignating paragraphs (c) and (d) as paragraphs (d) and (e); and by adding a new paragraph (c) to read as follows:

§ 12.39 Imported articles involving unfair methods of competition or practices.

* * * * *

(b) *Exclusion from entry; entry under bond; notice of exclusion order.*

* * * * *

(4) In addition to the notice given to importers or consignees of articles released under bond, port directors shall provide written notice to all owners, importers or consignees of articles which are denied entry into the United States pursuant to an exclusion order that any future attempt to import such articles may result in the articles being seized and forfeited. Copies of all such notices are to be forwarded to the Commercial Enforcement, Trade Compliance Division, at Customs Headquarters, and to the Office of The General Counsel, USITC, 500 E Street, S.W., Washington, DC 20436 by the district directors.

(c) *Seizure and Forfeiture Orders.*

(1) In addition to issuing an exclusion order under paragraph (b)(1) of this section, the Commission may issue an order providing that any

article determined to be in violation of § 337 be seized and forfeited to the United States. Such order may be issued if:

(i) The owner, importer, or consignee of the article previously attempted to import the article or like articles into the United States;

(ii) The article or like articles were previously denied entry into the United States by reason of an exclusion order issued under paragraph (b)(1) of this section; and

(iii) Upon such previous denial of entry, the port director of the port in which the entry was attempted had notified the owner, importer, or consignee of the article in writing of both the exclusion order and that seizure and forfeiture would result from any further attempt to import the article or like articles into the United States.

(2) Upon receipt of any seizure order issued by the Commission in accordance with this paragraph, Customs shall immediately notify all ports of entry of the property subject to the seizure order and identify the persons notified under paragraph (b)(4) of this section.

(3) The port director in the port in which the article was seized shall issue a notice of seizure to parties known to have an interest in the seized property. All interested parties to the property shall have an opportunity to petition for relief under the provisions of 19 CFR part 171. All petitions must be filed within 30 days of the date of issuance of the notice of seizure, and failure of a claimant to petition will result in the commencement of administrative forfeiture proceedings. All petitions will be decided by the appropriate Customs officer, based upon the value of the articles under seizure.

(4) If seized articles are found to be not includable in an order for seizure and forfeiture, then the seizure and the forfeiture shall be remitted in accordance with standard Customs procedures.

(5) Forfeited merchandise shall be disposed of in accordance with the Customs laws.

* * * * *

GEORGE J. WEISE,
Commissioner of Customs.

Approved: October 10, 1995.

JOHN P. SIMPSON,

Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 27, 1995 (60 FR 54939)]

19 CFR Part 4

(T.D. 95-88)

**ADDITION OF BELIZE TO THE LIST OF NATIONS
ENTITLED TO SPECIAL TONNAGE TAX EXEMPTION****AGENCY:** U.S. Customs Service, Department of the Treasury.**ACTION:** Final rule.

SUMMARY: Pursuant to information provided by the Department of State, the United States Customs Service has found that no discriminating duties of tonnage or imposts are imposed or levied in the ports of Belize upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise imported in the same from the United States or from any foreign country. Accordingly, vessels of Belize are exempt from special tonnage taxes and light money in ports of the United States. This document amends the Customs Regulations by adding Belize to the list of nations whose vessels are exempt from payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money.

EFFECTIVE DATE: The exemption from special tonnage taxes and light money for vessels registered in Belize became effective on March 7, 1995. This amendment is effective October 27, 1995.

FOR FURTHER INFORMATION CONTACT: Barbara E. Whiting, Entry and Carrier Rulings Branch, (202) 482-7040.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified amount per ton called "light money" on all foreign vessels which enter United States ports (46 U.S.C. App. 121, 128). However, vessels of a foreign nation may be exempted from the payment of special tonnage taxes and light money upon presentation of satisfactory proof that no discriminatory duties of tonnage or impost are imposed by that foreign nation on U. S. vessels or their cargoes (46 U.S.C. App. 141).

Section 4.22, Customs Regulations (19 CFR 4.22), lists those nations whose vessels have been found to be exempt from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money. The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations Branch.

FINDING

On the basis of information received from the Department of State regarding the absence of discriminating duties of tonnage or impost

imposed on U.S. vessels in the ports of Belize, the Customs Service has determined that vessels of Belize are exempt from the payment of the special tonnage tax and light money, effective March 7, 1995. The Customs Regulations are amended accordingly.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Because this amendment merely implements a statutory requirement and confers a benefit upon the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary; further, for the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1) and (3). Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Regulations Branch, U. S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Cargo vessels, Customs duties and inspection, Maritime carriers, Vessels.

AMENDMENT TO THE REGULATIONS

Part 4, Customs Regulations (19 CFR Part 4), is amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority for Part 4 and relevant specific authority continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91.

* * * * *

Section 4.22 also issued under 46 U.S.C. App. 121, 128, 141;

* * * * *

2. Section 4.22 is amended by inserting "Belize" in appropriate alphabetical order.

Dated: October 23, 1995.

HAROLD M. SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, October 27, 1995 (60 FR 54939)]

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U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, October 25, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
*Assistant Commissioner,
Office of Regulations and Rulings.*

REVOCATION OF RULING LETTER DISALLOWING CONTAINER MARKING EXCEPTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter disallowing the container country of origin marking exception.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking a ruling which held that the country of origin marking of a coffee canister must appear on the same side or panel of the canister containing the reference "By Appointment to His Majesty The King of Sweden." Notice of the proposed revocation was published September 13, 1995, in the CUSTOMS BULLETIN.

DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 8, 1996.

FOR FURTHER INFORMATION CONTACT: Monika Rice, Special Classification and Marking Branch, (202) 482-6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On September 13, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 37, proposing to revoke New York Ruling

Letter (NYRL) 809408 dated May 17, 1995. That ruling held that the country of origin marking of a coffee canister must appear on the same side or panel of the coffee canister containing the reference "By Appointment to His Majesty The King of Sweden" because this phrase triggered the requirements of 19 CFR 134.46. Therefore, the marking of the country of origin on the coffee canister's container alone was not sufficient. No comments were received in response to our notice of intent to revoke NYRL 809408.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking NYRL 809408 because it is Customs opinion that the phrase "By Appointment to His Majesty The King of Sweden" does not trigger the requirements of 19 CFR 134.46 because the ultimate purchaser would not confuse this as information concerning the origin of the canister, and because this phrase refers to the Gevalia coffee and not to the canister. Therefore, as the requirements of 19 CFR 134.46 are not triggered, 19 CFR 134.36(h) is not applicable. Section 134.36(b), Customs Regulations (19 CFR 134.36(b)), does not allow an exception from marking to any article or retail container bearing any words described in 134.46 which imply that an article was made in a country other than the actual country of origin. Accordingly, since 134.46 is not triggered, an exception from marking the coffee canister itself under 19 U.S.C. 1304(a)(3)(D) and 19 CFR 134.32(d) may be found because the carton in which the canister is packed is a properly marked container which reaches the ultimate purchaser in the U.S. by mail. A copy of Headquarters Ruling Letter 559267 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: October 20, 1995.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,

U.S. CUSTOMS SERVICE,

Washington, DC, October 20, 1995.

CLA-2 R:C:S 559267 MLR

Category: Marking

ROBERT L. FOLLIACK, ESQ.
FOLLIACK & BESSICH, P.C.
225 Broadway, Suite 500
New York, NY 10007

Re: Country of origin marking on ceramic coffee canisters; containers; cardboard box; marking exception; 19 CFR 134.46; 19 CFR 134.32(d); 19 CFR 134.36(b); revocation.

DEAR MR. FOLLIACK:

This is in reference to your letter of June 15, 1995, requesting reconsideration of New York Ruling Letter (NYRL) 809408 dated May 17, 1995, on behalf of Jayme Products, concerning a country of origin marking exception for certain ceramic coffee canisters. A sample was submitted with your request. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993) (hereinafter "section 625"), notice of the proposed revocation of NYRL 809408 was published September 13, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 37.

Facts:

Jayme Products is the importer of ceramic coffee canisters which are sold exclusively by mail order either as a promotional item to first time coffee purchasers, or by mail order offered from a General Foods catalogue. In all instances, it is stated that the canisters are distributed to the ultimate purchaser directly by mail packed in an original sealed cardboard box in which the canister is imported. The canisters are never sold as open stock or without its packaging.

The sample canister is packed in a white cardboard box which itself is packed in a mailing carton. The front side panel of the cardboard box has an open panel so that the canister with the words "Gevalia Kaffe" is visible upon opening the mailing carton. (The canister does not contain any coffee) Affixed to the side panel of the cardboard box (the bottom of the white cardboard box as the canister is lying in the mailing carton) is a label measuring 2 x 1 1/8 inches, with the marking "Made in Taiwan." Inside the cardboard box, the canister is secured by two pieces of styrofoam placed at the top and bottom. After removing the canister from the white cardboard box, the words "By Appointment to His Majesty The King of Sweden" become apparent on top of the canister.

Issue:

Whether the ceramic coffee canisters may be excepted from marking pursuant to 19 U.S.C. 1304(a)(3)(D) and 19 CFR 134.32(d), provided the cardboard box containing the canister, which itself is packed in a mailing carton, is marked with the country of origin of the canister.

Law and Analysis:

The marking statute, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134) implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

Pursuant to 19 U.S.C. 1304(a)(3)(D) and section 134.32(d), Customs Regulations {19 CFR 134.32(d)}, an exception from individual marking is applicable where the marking of the container of an imported article will reasonably indicate the origin of the article. This exception is normally applied in cases where the imported article is imported in a properly marked container and Customs officials at the port of entry are satisfied that the ultimate purchaser in the U.S. will receive it in its original marked container.

In NYRL 809408, it was determined that the reference "By Appointment to His Majesty The King of Sweden" on the top of the canister invoked 19 CFR 134.46, which requires that in cases where the name of a location other than the country in which the article was produced appears on the article or its container, there shall appear, legibly and permanently, in close proximity to such words, letters, or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning. Therefore, NYRL 809408 held that the country of origin marking "Made in Taiwan" must appear on the side or panel of the canister that makes reference to the country of "Sweden."

In this case, it is claimed that the provisions of 19 CFR 134.46 are not triggered and that NYRL 809408 did not consider that the canisters are only distributed by mail. Therefore, an exception from marking the canister is requested because the cardboard box will be marked with the country of origin of the canister packed therein, and since the canister is solely distributed by mail, the ultimate purchaser will see the country of origin on the cardboard box. In your submission to the New York Seaport, you cite Headquarters Ruling Letter (HRL) 734529 dated April 13, 1992, where Customs held that 12 golf balls packed in four sleeves, three balls per sleeve, inside a remainder box marked with a sticker labeled "Made in Taiwan" and sold directly to the retail customer were excepted from individual marking so long as the district director was able to determine that the items would only be sold in this manner.

Customs has consistently held that in those cases in which reference to a place other than the country of origin is made on an imported article, but such reference would not confuse the ultimate purchaser, the requirements of 19 CFR 134.46 are not triggered. Furthermore, Customs has determined that the special requirements of 19 CFR 134.36(b) should not be applied automatically to all imported articles or their containers which bear a non-origin geographical reference. Section 134.36(b), Customs Regulations (19 CFR 134.36(b)) states that an exception from marking shall not apply to any article or retail container bearing any words, letters, names, or symbols described in 134.46 which imply that an article was made in a country other than the actual country of origin.

In HRL 732412 dated August 29, 1989, Customs found that the placement of the word "Kansas" on different parts of imported jeans did not trigger the requirements of 19 CFR 134.46 because such marking was used as a symbol or decoration and would not reasonably be construed as indicating the country of origin of the article on which it appeared. Likewise, in HRL 733695 dated January 15, 1991, women's trousers with metal rivets die-stamped with the words "Bonjour Paris", and containing a fabric label sewn into the waistband indicating the country of origin as Hong Kong, were not subject to the requirements of 19 CFR 134.46 since the rivets were decoration on the garment and an integral part of the design. However, in HRL 732486 dated September 5, 1989, a label, crest, and hangtag containing the words "Riviera Line" were attached to imported garments. The hangtag contained a picture of a cruise ship in the center with two circles around the ship. Below the ship in large hold lettering was the phrase "RIVIERA LINE." The crest had a large script letter "R" in the center surrounded by a crest with the word "RIVIERA" below the letter "R." It was determined that while the crest was part of the design of the garment, the hangtag with the phrase "Riviera Line" triggered the special marking requirements of 19 CFR 134.46; therefore, the hangtag had to contain the country of origin printed in a conspicuous manner and placed in close proximity to the phrase "Riviera Line." The rationale was that a locality other than the country of origin is more likely to cause confusion when it appears on a hangtag attached to a garment because a hangtag is designed to attract the attention of the purchaser and generally contains information about the article. As such, a reference on the hangtag to a locality other than the country of origin of the article to which it is attached was potentially misleading with regard to the garment's country of origin.

In this case, although the canister contains the phrase "By Appointment to His Majesty The King of Sweden," we do not find that the reference to Sweden triggers the requirements of 19 CFR 134.46. First, the ultimate purchaser of the coffee and coffee canisters should understand that "By Appointment to His Majesty The King of Sweden" refers to the Gevalia coffee and not to the canister. Second, it is our opinion that the ultimate purchaser would not confuse the reference to the King of Sweden as any information concerning the origin of the canister. Since the purpose of 19 CFR 134.46 is to prevent the ultimate purchaser from being confused as to the country of origin of a product, we conclude that the reference to the King of Sweden does not invoke the requirements 19 CFR 134.46. Accordingly, as the requirements of 19 CFR 134.46 are not triggered, 19 CFR 134.36(b) is not

applicable. Therefore, we find that an exception from marking the canister itself under 19 U.S.C. 1304(a)(3)(D) and 19 CFR 134.32(d) may be found because the carton in which the canister is packed is a properly marked container which reaches the ultimate purchaser in the U.S. by mail.

Holding:

Based upon the information provided, it is our opinion that the reference "By Appointment to His Majesty The King of Sweden" does not trigger the requirements of 19 CFR 134.46. Therefore, we find that an exception from marking the canister itself under 19 U.S.C. 1304(a)(3)(D) and 19 CFR 134.32(d) may be found because the carton in which the canister is packed is a properly marked container which reaches the ultimate purchaser in the U.S. by mail.

NYRL 809408 is hereby revoked.

In accordance with section 623, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 623 does not constitute a change of practice or position in accordance with 19 CFR 177.10(c)(1).

SANDRA L. GETHERS,

(for John Durant, Director,

Tariff Classification Appeals Division.)

**PROPOSED MODIFICATION OF CUSTOMS RULING LETTER
RELATING TO TARIFF CLASSIFICATION OF COLOR UPGRADE
KIT FOR COMPUTER PRINTER**

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a color upgrade kit for a computer printer. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before December 8, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Branch, Tariff Classification Appeals Division (202) 482-7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a color upgrade kit for a computer printer. In NY 805826, issued on February 2, 1995, the components for a color upgrade kit were classified separately as follows: the motor was classified under subheading 8501.10.40 Harmonized Tariff Schedule of the United States (HTSUS), which provides for electric motors "of an output not exceeding 37 W: [o]f under 18.65 W: [o]ther;" the software driver disk was classified under subheading 8524.90.40, HTSUS, which provides for other recorded media for sound or other similarly recorded phenomena; and the color ribbon was classified under subheading 9612.10.10, HTSUS, which provides for typewriter or similar ribbons, inked or otherwise prepared for giving impressions, measuring less than 30 mm in width, permanently put up in plastic or metal cartridges of a kind used in ADP or other machines. The components for the kit were classified separately because it was determined that the kit was "a collection of items rather than a set for classification purposes." Customs Headquarters is of the opinion that the color upgrade kit is a GRI 3(b) set, and is classifiable, with the exception of the software, under subheading 8501.10.40, HTSUS (as the motor is the component which gives the kit its essential character). The software is classifiable, pursuant to note 6 to chapter 85, under subheading 8524.90.40, HTSUS. Customs intends to modify NY 805826 to reflect the proper classification of the kit. Before taking this action, consideration will be given to any written comments timely received. NY 805826 is set forth in Attachment A to this document, while proposed Headquarters Ruling 958449 modifying NY 805826 is set forth in Attachment B.

Claims for detrimental reliance under section 177.9 Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: October 19, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,

U.S. CUSTOMS SERVICE,

New York, NY, February 2, 1996.

CLA-2-85:S:N:N3:113 805826 JTS

Category: Classification

Tariff No. 8501.10.4060,

8524.90.4090, and 9612.10.1010

MR. JOHN HANSON
EPSON AMERICA, INC.
20770 Madrona Ave
Torrance, CA 90503-3777

Re: The tariff classification of a color upgrade kit from Japan.

DEAR MR. HANSON:

In your letter dated December 28, 1994, you requested a tariff classification ruling.

The merchandise is a color upgrade kit for an ADP computer printer, item number C832081. The kit contains a motor with an output of 2 Watts, a software driver disk, and a color ribbon. The product is specifically designed to enable a particular model of Epson printer to print in color. The motor, disk, and ribbon are packaged together for retail sale. In our opinion, the kit is a collection of items rather than a set for classification purposes; therefore, the three items will be treated individually.

The applicable subheading for the motor will be 8501.10.4060, Harmonized Tariff Schedule of the United States (HTS), which provides for electric motors and generators, motors of an output not exceeding 37.5 W, of under 18.65 W, other, DC, other. The rate of duty will be 6.2 percent *ad valorem*.

The applicable subheading for the disk will be 8524.90.4090, Harmonized Tariff Schedule of the United States (HTS), which provides for records, tapes and other recorded media for sound or other similarly recorded phenomena * * * other, other, other. The rate of duty will be 7.8 cents per square meter of recording surface.

The applicable subheading for the ribbon will be 9612.10.1010, Harmonized Tariff Schedule of the United States (HTS), which provides for typewriter or similar ribbons, inked or otherwise prepared for giving impressions * * * ribbons, measuring less than 30 mm. in width, permanently put up in plastic or metal cartridges (whether or not containing spools) of a kind used in typewriters, automatic data processing or other machines, woven, of man-made fibers. The rate of duty will be 3.8 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents tiled at the time this merchandise is imported if the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,

Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
Washington, DC
CLA-2 R:C:M 958449 LTD
Category: Classification
Tariff No. 8501.10.40 and 8524.90.40

MR. JOHN HANSON
EPSON AMERICA, INC.
20770 Madrona Avenue
Mall Stop B1-02
Torrance, CA 90503-3777

Re: Color upgrade kit for computer printer; HQs 950925, 952154, 952775, 955882; NY 805826 *modified*; heading 9612; GRI 3 (sets); EN to GRI 3(b); Chapter 85, Note 6.

DEAR MR. HANSON:

This is in response to your letter of August 31, 1995, to Customs in New York, requesting reconsideration of NY 805826, dated February 2, 1995, which concerned the classification of a color upgrade kit for a computer printer under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter was referred to this office for a response.

Facts:

The article in question is a color upgrade kit for an automatic data processing (ADP) color printer (item C832081). The kit contains a motor with an output of two Watts, a software driver disk and a color ribbon. The product is designed to enable a particular model of Epson, single color dot matrix printer, to print in color. The motor is installed to lift the ribbon to the appropriate color, the software driver disk interprets the computer's instructions for the printer and the ribbon transfers the appropriate color to the medium. The motor, disk and ribbon are imported and sold as a prepackaged kit. The value of the entire kit is \$29.40 (motor, \$17.84; ribbon, \$10.29; and software, \$1.47).

Issue:

Whether the color upgrade kit is a GRI 3(b) set.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states, in pertinent part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System, and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

In NY 805826, the components for the color upgrade kit were classified separately as follows: the motor was classified under subheading 8501.10.40, HTSUS, which provides for electric motors "of an output not exceeding 37.5 W: [o]f under 18.65 W: [o]ther;" the software was classified under subheading 8524.90.40, HTSUS, which provides for other recorded media for sound or other similarly recorded phenomena; and the ribbon was classified under subheading 9612.10.10, HTSUS, which provides for typewriter or similar ribbons, inked or otherwise prepared for giving impressions, measuring less than 30 mm in width, permanently put up in plastic or metal cartridges of a kind used in ADP or other machines. The components for the kit were classified separately because it was determined that the kit was "a collection of items rather than a set for classification purposes."

The color upgrade kit consists of a collection of goods that is not described by the terms of a single heading. Because the kit consists of goods that are *prima facie* classifiable under two or more headings, it is necessary to resort to GRI 3. See GRI 2(b). GRI 3(a) provides, in pertinent part, that "when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods." GRI

3(b), which governs the classification of "sets," provides that "goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."

The Explanatory Notes to GRI 3(b), pg. 4, state that "[f]or the purposes of this Rule, the term 'goods put up in sets for retail sale' shall be taken to mean goods which:"

(a) consist of at least two different articles which are, *prima facie*, classifiable in different headings * * *;

(b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and

(c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards) [emphasis in original].

The components of the kit, as stated above, are *prima facie* classifiable in different headings. The kit consists of components that are put up together to meet a particular need—converting a single color dot matrix printer into a color dot matrix printer. See HQ 955682, dated May 17, 1994 (concerning a bicycle upgrade kit, which includes disparate bicycle components that may or may not be used together to meet a particular need or carry out a specific activity). Finally, the kit is imported and sold as a pre-packaged unit. The color upgrade kit is therefore considered a "set" for tariff purposes, and it is classifiable as if it consisted of the component which gives the kit its "essential character."

The Explanatory Notes to GRI 3(b), pg. 4, states that "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use the goods." All of the components play a significant role in the conversion of a single color dot matrix printer into a color dot matrix printer—the motor is installed to lift the ribbon to the appropriate color, the software interprets the computer's instructions for the printer and the ribbon transfers the appropriate color to the medium. However, the motor and software, which will replace the printer's present driver, are permanently installed into the machine. The ribbon, on the other hand, is a disposable article that will be replaced by a separately purchased ribbon. The items that upgrade the printer are the motor and software. With regard to the motor and software, there is a significant difference in value between the two. The motor is valued at \$17.64 (60% of the entire kit's value), while the software is valued at only \$1.47 (5%). Accordingly, based on its role in relation to the use of the goods and its significant value, the motor provides the kit with its "essential character." The kit, with the exception of the software, is therefore classifiable under subheading 8501.10.40, HTSUS. Note 8 to chapter 65, HTSUS, requires that the software be classified separately under heading 8524, HTSUS, specifically under subheading 8524.90.40, HTSUS. See HQ 950925, dated May 12, 1992; HQ 952154, dated November 17, 1992; HQ 952775 dated February 16, 1993 (rulings relating to the application of note 6 to chapter 85 and GRI 3(b)). NY 805626 is modified accordingly.

Holding:

The Color Upgrade Kit, with the exception of the software, is classifiable under subheading 8501.10.40, HTSUS, which provides for electric motors "of an output not exceeding 37.5 W: [o]f under 16.65 W: [o]ther." The corresponding rate of duty for articles of this subheading is 6.2% *ad valorem*. The software is classifiable under subheading 8524.90.40, HTSUS, which provides for other recorded media for sound or other similarly recorded phenomena. The corresponding rate of duty for articles of this subheading is 7.8 cents per square meter of recording surface.

JOHN DURANT,

Director,

Tariff Classification Appeals Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ELECTRONIC CARD ASSEMBLIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of electronic card assemblies for electroluminescent (EL) flat-panel displays. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before December 8, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington DC.

FOR FURTHER INFORMATION CONTACT: Robert Altneu, Attorney-Advisor Tariff Classification Appeals Division (202) 482-7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of electronic card assemblies for electroluminescent (EL) flat-panel displays.

In NY 857740, issued on November 9, 1990, by the Area Director of Customs, New York Seaport, electronic card assemblies for EL flat-panel displays was classified, based upon principal use, under subheading 8473.30.40, Harmonized Tariff Schedule of the United States (HTSUS), as parts and accessories of the machines of heading 8471, not incorporating a cathode ray tube. NY 857740 is set forth in "Attachment A" to this document.

Subsequent information has been provided indicating that EL flat-panel displays have a variety of uses other than automatic data processing (ADP) output units. See HQ 957793, issued on April 19, 1995. Because the electronic card assemblies are integral parts of EL flat-

panel displays. Customs is of the opinion that the merchandise is not classifiable as parts of ADP units. Under the authority of Legal Note 2(b) to section XVI, HTSUS, the electronic card assemblies are classifiable under subheading, 6543.90.55, HTSUS, which provides for other parts of electrical machines and apparatus having individual functions, not specified or included elsewhere in chapter 85, HTSUS.

Customs intends to revoke NY 857740 to reflect the proper classification of the electronic card assemblies under subheading 8543.90.55, HTSUS. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters ruling 957795 revoking NY 857740 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: October 24, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, November 9, 1990.
CLA-2-84:S:N:NI:110 857740
Category: Classification
Tariff No. 8473.30.4000

MS. JANET MOORE
HARPER ROBINSON & CO.
9620 N.E. Colfax
Portland, OR 97720

Re: The tariff classification of electronic card assemblies from Singapore.

DEAR MS. MOORE:

In your letter dated October 30, 1990, on behalf of Planar Systems, you requested a tariff classification ruling.

The merchandise under consideration involves three models of electronic card assemblies that are designed for use with electroluminescent flat-panel displays.

The three models are described as follows: Planar P/N 944-1000-50 Assembly, ECA, Driver/Controller, EL6648MS; Planar P/N 944-2000-00 Assembly, ECA, Driver/Controller, EL8358MS; Planar P/N 944-0035-00 Assembly, ECA, Driver/Controller, EL8358HR. These components are used to control and run the display program and consist essentially of a programmable gate array controller, column and row drivers, and a printed circuit board. After importation into the United States, the fusion glass component is added to the card assembly which converts it into an EL flat-panel display. Information submitted indicates that the EL displays are principally used with automatic data processing machines such as personal computers, lap-top computers, and workstations.

The applicable subheading for the electronic card assemblies will be 8473.30.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for parts and accessories of the machines of heading 8471 not incorporating a cathode ray tube. The rate of duty will be free.

The ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC
CLA-2 R:C:M 957795 RFA
Category: Classification
Tariff No. 8543.90.55

MS. JANET MOORE
HARPER ROBINSON & CO.
9620 N.E. Colfax
Portland, OR 97720

Re: Electronic card assemblies for Electroluminescent (EL) flat-panel displays; parts for EL flat-panel displays; parts of Automatic Data Processing (ADP) machines; electrical machines and apparatus, having individual functions, not specified or included elsewhere; headings 6473, 6543; Legal Note 2 to Section XVI; HQs 958276, 957793; NY 857740, revoked.

DEAR MS. MOORE:

This is in reference to NY 857740 issued to you on behalf of Planar Systems, on November 9, 1990, by the Area Director of Customs in New York, concerning the tariff classification of electronic card assemblies under the Harmonized Tariff Schedule of the United States (HTSUS). In the course of ruling on similar merchandise, we have determined that NY 857740 is incorrect.

Facts:

The merchandise under consideration involves three models of electronic card assemblies that are designed for use with electroluminescent (EL) flat-panel displays. The three models are described as follows: Planar P/N 944-1000-00 Assembly, ECA, Driver/Controller, EL6648MS; Planar P/N 944-2000-00 Assembly, ECA, Driver/Controller, EL8358MS; Planar P/N 944-0035-00 Assembly, ECA, Driver/Controller, EL8358HR. The difference between the EL6648MS and EL8358MS is one of size (the first two numbers designate lines per inch and the last two designate width and height in inches). The HR on the EL6358HR designates that it is a higher resolution display than the normal EL8358MS.

The subject merchandise is used to control and run the display program on EL flat-panel displays. Each electronic card assembly consists essentially of a programmable gate array controller, column and row drivers, and a printed circuit board. After importation into the United States, the fusion glass component is added to the card assembly which converts it into an EL flat-panel display. Information originally submitted indicates that the EL displays are principally used with automatic data processing (ADP) machines such as personal computers, laptop computers, and workstations.

Issue:

Are the electronic card assemblies classifiable as parts of ADP units under the HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

In NY 857740, dated November 9, 1990, Customs held that the subject electronic card assemblies were classifiable under heading 8473, HTSUS, as parts of ADP units based

upon information that the EL flat-panel displays were principally used with ADP machines such as personal computers, laptop computers, and workstations. Since the issuance of that ruling, it has come to our attention that EL flat-panel displays can be used in a variety of merchandise such as portable patient medical monitors, telecommunications test equipment, point of sale, and transportation computers in semi-trucks.

Because the EL flat-panel displays have numerous uses, they are no longer principally used with ADP machines. In HQ 957793, dated April 19, 1995: Customs determined that EL display panels for blood pressure monitors were distinguishable from liquid crystal display (LCD) panels because they utilize different technology to achieve their function and were therefore classifiable in subheading 8543.80.96, HTSUS, as other electrical machines and apparatus, having individual functions, not specified or included elsewhere in chapter 85: HTSUS. Customs made this decision after reviewing "Classification Opinion 8543.80/1", which held that EL devices were goods of subheading 8543.80, HTS. This classification opinion was included in the "Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System." Like the Harmonized Commodity Description and Coding System Explanatory Notes (ENs), the classification opinions in the Compendium constitute the official interpretation of the HTSUS. While not legally binding, they provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89-80, 54 FR 35127, 35128 (August 23, 1989).

Because the EL flat-panel displays are not principally used as ADP output units, the electronic card assemblies cannot be classified as parts of ADP units under heading 8473, HTSUS. The electronic card assemblies are used to control and run the display program and consist essentially of a programmable gate array controller, column and row drivers, and a printed circuit board. After importation, the fusion glass component is added to the card assembly which converts it into an EL flat-panel display. The subject merchandise is clearly a part of an EL flat-panel display. Customs has consistently held that goods which are identifiable as parts of machines or apparatus of chapters 84 or 85, HTSUS, are to be classified in accordance with Legal Note 2 to section XVI, HTSUS, which provides that;

Parts of machines (not being parts of the articles of heading 8484, 6544, 8545, 8546 or 8547) are to be classified according to the following rules:

- (a) Parts which are goods included in any of the headings of Chapter 84 and 85 (other than headings 8485 and 8548) are in all cases to be classified in their respective headings;
- (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 6479 or 8543) are to be classified with the machines of that kind. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517;
- (c) All other parts are to be classified in heading 6465 or 6548.

The electronic card assemblies are not described in any of the headings of chapter 84 or 85, HTSUS. However, the information before us indicates that the electronic card assemblies are integral, constituent and component parts necessary to the completion and proper functioning of EL flat-panel displays. Because they are suitable for use solely or principally with EL flat-panel displays, we find that they are classifiable as parts under heading 8543, HTSUS, based upon the authority of Legal Note 2(b) to section XVI, HTSUS. See HQ 958276, dated October 6, 1995, for a similar holding involving fusion glass for EL flat-panel displays as parts of electrical machines and apparatus, having individual function, not elsewhere specified or included.

Holding:

The electronic card assemblies for EL flat-panel displays are classifiable under subheading 8643.90.55, HTSUS, which provides for: "[e]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: [p]lans: [o]ther: [p]rinted circuit assemblies * * *." The general, column one rate of duty is 3.6 percent *ad valorem*.

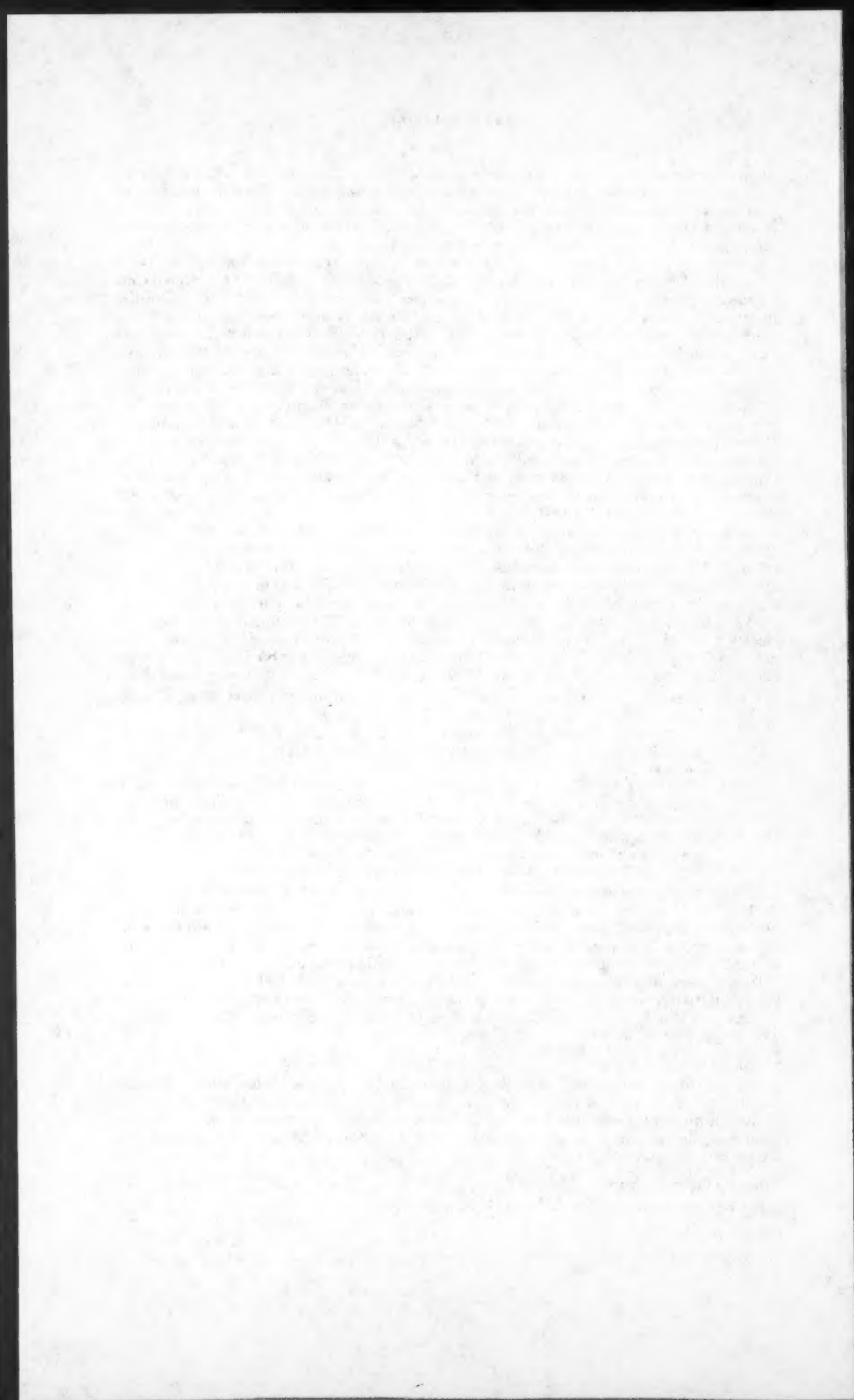
Effect on Other Rulings:

NY 857740, issued on November 9, 1990, is revoked.

JOHN DURANT,

Director,

Tariff Classification Appeals Division.



U.S. Court of Appeals for the Federal Circuit

GOODMAN MANUFACTURING, L.P., PLAINTIFF-APPELLANT v.
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 94-1477

(Decided October 24, 1995)

William M. Methenitis, Strasburger & Price, L.L.P., of Dallas, Texas, argued for plaintiff-appellant. With him on the brief was *Andrew G. Halpern*.

Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Frank W. Hunger*, Assistant Attorney General, *David M. Cohen*, Director and *Carla Garcia-Benitez*. Also on the brief was *Karen P. Binder*, Office of the Assistant, Chief Counsel, International Trade Litigation, U.S. Customs Service, of counsel.

Marshall V. Miller and *Melissa Farley Sebree*, Miller & Company, P.C., of Kansas City, Missouri, were on the brief for Amicus Curiae, National Association of Foreign-Trade Zones.

Lauren R. Howard and *Mary T. Staley*, Collier, Shannon, Rill & Scott, of Washington, DC, were on the brief for Amicus Curiae, American Iron and Steel Institute.

Appealed from: U.S. Court of International Trade.

Judge CARMAN.

Before ARCHER, Chief Judge, MAYER and RADER, Circuit Judges.

MAYER, Circuit Judge.

Goodman Manufacturing, L.P., appeals a June 30, 1994, judgment of the Court of International Trade, 855 F. Supp. 1301 (Ct. Int'l Trade 1994), denying its motion for summary judgment and granting the government's cross-motion for summary judgment. We reverse.

BACKGROUND

In 1934, Congress authorized the creation of a Foreign Trade Zone Board "to grant to public and private corporations the privilege of establishing, operating, and maintaining foreign-trade zones for the purpose of expediting and encouraging foreign commerce." S. Rep. No. 1107, 81st Cong., 2d Sess. 1-2 (1949), reprinted in 1950 United States Code Cong. Serv. 2533, 2533-34; see also 19 U.S.C. § 81b(a) (1994). A foreign-trade zone is "an isolated, fenced off, and policed area within or adjacent

to a port of entry." S. Rep. No. 1107 at 2, 1950 United States Code Cong. Serv. at 2533. A foreign-trade zone allows foreign merchandise to be manipulated "with a minimum of customs control and without customs bond" until it is brought into United States customs territory, at which point it is "subject to all customs laws and regulations." *Id.*

The relevant facts were stipulated before the Court of International Trade. In April 1990, Goodman requested a letter ruling from the United States Customs Service on the allowance for recoverable and irrecoverable waste found in section 3 of the Foreign Trade Zones Act, 19 U.S.C. § 81c (1994). This allowance is calculated when determining the appropriate dutiable value of "privileged foreign merchandise"¹ entering United States customs territory as part of a finished product manufactured in a foreign-trade zone ("zone"). In July 1991, Customs ruled that the allowance is calculated by reducing the dutiable value of the foreign merchandise used in the manufacture of the goods entering United States customs territory by an amount equal to the transaction value of any recoverable waste produced. See Priv. Ltr. Rul. HQ 544602 (July 15, 1991). It ruled that this deduction of the transaction value of the recoverable waste is "[t]he only adjustment that Customs can make" to the dutiable value of the privileged foreign merchandise.

On May 12, 1992, Goodman admitted three cores of Korean cold rolled steel sheets into a foreign-trade subzone² in Houston, Texas, as privileged foreign merchandise, at a total cost of \$4,848.24 (28,109 pounds of steel at \$.17248/pound), exclusive of shipping and insurance costs. It used all of this steel to make 874 furnaces, which were entered into United States customs territory on May 15, 1992. The manufacturing process produced 2,652 pounds of recoverable scrap steel, which Goodman sold for \$81.68.³

In accordance with its July 1991 letter ruling, Customs subtracted the transaction value of the scrap steel (\$81.68) from the transaction value of the privileged foreign steel (\$4,848.24) to arrive at the dutiable value of the privileged foreign steel (\$4,767.00). That is to say, Customs subtracted the actual sales price received for the recoverable steel waste from the full price paid for all privileged foreign steel admitted to the zone.

Goodman filed a protest of this valuation, which was denied. It initiated this action in the Court of International Trade to contest the denial. Goodman argued that subtracting the quantity of steel scrap at the value per pound of the privileged foreign steel (2,652 lbs. x \$0.17248/lb

¹ Under 19 C.F.R. § 146.41(a) (1995), foreign merchandise admitted to a foreign-trade zone may be designated "privileged" at any time before it is manipulated or manufactured, upon application to and approval by the district director of Customs with jurisdiction over the foreign-trade zone. Privileged foreign merchandise retains its original identity even if it later goes through a manufacturing process. See *id.* § 146.41(e). For example, in this case, privileged foreign steel was made into furnaces in the zone. When the furnaces were entered into United States customs territory, it was the steel, not the finished furnaces, that was considered entered and subject to duty.

² A foreign-trade subzone "has all the characteristics of a zone except that it is an area separate from an existing zone" and "can only be created when a company cannot be accommodated within the zone." *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1582 n.3 (Fed. Cir. 1994).

³ The scrap was classified as nonprivileged foreign merchandise and was entered and appraised at the transaction value of \$81.68. There is no dispute over the dutiable value of the scrap or the duties paid on it.

= \$457.42) from the transaction value of the privileged foreign steel (\$4,848.24) would result in the correct dutiable value of the privileged foreign steel (\$4,390.82). In other words, Goodman claimed that it need only pay duty on the physical quantity of steel that actually entered United States customs territory in the manufactured items. *See* 855 F. Supp. at 1302.

In approving Customs's calculation of the allowance, the Court of International Trade characterized the allowance as a "deduction" for the recoverable waste "generated as a result of the processing in the zone," and noted that Customs classifies and appraises the recovered waste based on its character and condition at the time of entry into customs territory. *Id.* at 1305. The court rejected Goodman's interpretation of section 81c, explaining that it would create problems where the quantity of merchandise changes as a result of physical or chemical changes caused by the manufacturing process in the zone. *See id.* at 1306. The court further held that Customs's interpretation was entitled to a presumption of correctness and that Goodman had not overcome the presumption. Thus, the Court of International Trade granted summary judgment to the government.

DISCUSSION

I

The issue is whether the Court of International Trade correctly held that the allowance for recoverable waste provided for in section 81c equals the value of the waste. We review statutory interpretation by the Court of International Trade *de novo*. *Guess? Inc. v. United States*, 944 F.2d 855, 857 (Fed. Cir. 1991). A decision granting summary judgment is also reviewed *de novo*. *See id.*

The Court of International Trade made the general statement that Customs's "decisions enjoy a presumption of correctness" and, more specifically, stated that Goodman "failed to overcome the presumption of correctness that attaches to the valuation methodology adopted by Customs." 855 F. Supp. at 1303, 1306. These statements reflect a commingling of two concepts: (1) deference to an agency's reasonable interpretation of the statute it administers; and (2) the statutory presumption, found in 28 U.S.C. § 2639, that Customs's decisions have a proper factual basis unless the opposing party proves otherwise. *See* 28 U.S.C. § 2639(a)(1) (1988) ("[I]n any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision."). Because there was no factual dispute between the parties, the presumption of correctness is not relevant. Instead, we must determine whether Customs's decision is based on a permissible construction of the trade statutes. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

Both parties filed cross-motions for summary judgment, and both agreed that only an issue of law separated them. Thus, summary judgment was appropriate, and the only question is whether the Court of International Trade erred in accepting Customs's interpretation of the statutory allowance for waste.

II

Our interpretation of the statute begins with the language employed by Congress. *Mallard v. United States Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296, 300-01 (1989); *Watt v. Alaska*, 451 U.S. 259, 265 (1981). The treatment and appraisal of foreign merchandise entered into United States customs territory from a foreign-trade zone is provided for in 19 U.S.C. § 81c, the provision at issue, which reads as follows:

Foreign and domestic merchandise of every description, except such as is prohibited by law, may, without being subject to the customs laws of the United States, * * * be brought into a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured * * *, and be exported, destroyed, or sent into customs territory of the United States therefrom * * *, but when foreign merchandise is so sent from a zone into customs territory of the United States it shall be subject to the laws and regulations of the United States affecting the imported merchandise: *Provided, That whenever the privilege shall be requested * * *, the appropriate customs officer shall take under supervision any lot or part of a lot of foreign merchandise in a zone, cause it to be appraised and taxes determined and duties liquidated thereon.* Merchandise so taken under supervision * * * may be sent into customs territory upon the payment of such liquidated duties and determined taxes thereon. *If merchandise so taken under supervision has been manipulated or manufactured, such duties and taxes shall be payable on the quantity of such foreign merchandise used in the manipulation or manufacture of the entered article. Allowance shall be made for recoverable and irrecoverable waste; and if recoverable waste is sent into customs territory, it shall be dutiable and taxable in its condition and quantity and at its weight at the time of entry.*

19 U.S.C. § 81c (emphasis added).

Under the corresponding Customs regulations, the dutiable value of privileged foreign merchandise contained in articles transferred from a zone to United States customs territory is based on the price paid for the merchandise in the transaction that caused it to be entered into the zone, and the dutiable value of any nonprivileged waste produced is based on the transaction that caused it to enter customs territory. 19 C.F.R. § 146.65(b)(2). Thus, 19 C.F.R. § 146.65(b)(2) provides that the dutiable value of privileged foreign steel is "the price actually paid or payable for the merchandise in the transaction that caused the merchandise to be admitted into the [foreign-trade] zone," less international shipment and insurance costs and United States inland freight costs. Under the same provision, the dutiable value of steel waste is

determined by "the price actually paid or payable to the zone seller in the transaction that caused the recoverable waste or scrap to be transferred from the zone."

A

Goodman argues that the plain language of section 81c requires that the waste allowance be measured in terms of the quantity of waste, with the waste valued at the same price as the non-waste privileged foreign steel. It reasons that the phrase "allowance shall be made for recoverable and irrecoverable waste" modifies the mandate of the immediately preceding sentence that "duties and taxes shall be payable on the *quantity* of such foreign merchandise used in manipulation or manufacture of the entered article." Taking this language to signify a quantity-based approach, Goodman would deduct the quantity of steel scrap from the original amount of dutiable steel before calculating the dutiable value of the privileged foreign steel. The company contends that this is the only approach that produces rational results consistent with the requirements of transaction value, the mandatory method of valuation in this case.

Although Goodman imported 28,109 pounds of steel, under this approach, its allowance of 2,652 pounds of scrap would result in duties being assessed on only 25,457 pounds of steel at the rate applicable to the privileged merchandise. This calculation is as follows:

Transaction value of 28,109 pounds of privileged foreign steel	minus	2,652 pounds steel waste at the value per pound of privileged foreign steel	equals	dutiable value of privileged foreign steel
28,109 lbs. x \$.17248/lb.	-	2,652 lbs. x \$.17248/lb.	=	25,457 lbs. x \$.17248/lb.
\$4,848.24		\$457.42		\$4,390.82

At an *ad valorem* duty rate of 5.1%, this results in a duty of \$223.93.

We do not accept Goodman's proposed methodology, because it oversimplifies the language of section 81c. It focuses on the word "quantity" in the statute to the exclusion of the phrase "used in the manufacturing process." Although Goodman argues that the statutory focus on "quantity" means that the allowance must be a reduction in the amount of steel to be dutied, the statute is not entirely clear on that point. The phrase "[a]llowance shall be made" simply does not indicate any particular method.

Goodman also does not consider the full implication of the last clause of section 81c, which provides that "if recoverable waste is sent into customs territory, it shall be dutiable and taxable in its *condition and quantity* and at its weight at the time of entry." 19 U.S.C. § 81c (emphasis added). By focusing solely on quantity, Goodman's approach values the recoverable waste at the full value per pound of the privileged foreign steel for purposes of the allowance. The result is that the steel waste is

overvalued. In fact, under this approach it is as though the steel waste never existed, which belies the view that "Congress signalled its intention to make the imposition of immediate duties dependent on the operations that occur in a foreign trade zone when it listed the activities that could be performed on merchandise brought into a zone." *Nissan Motor Mfg. Corp., U.S.A. v. United States*, 884 F.2d 1375, 1377 (Fed. Cir. 1989).

B

Customs's determination, approved by the Court of International Trade, is also incorrect. Customs subtracted the transaction value of the recoverable waste produced during the manufacturing process and entered into United States customs territory from the value of the privileged foreign steel brought into the zone. The figure used for the transaction value of the recoverable waste was the actual sales price received for the waste when it entered United States customs territory. This calculation was as follows:

Transaction value of 28,109 pounds of privileged foreign steel	minus	transaction value of the steel waste	equals	dutiable value of privileged foreign steel
\$4,848.24	-	\$81.68	=	\$4,767.00

At the applicable *ad valorem* rate of duty of 5.1 percent, the duty is \$243.12.

This explanation improperly conflates the waste allowance and the provision for calculating the dutiable value of any recoverable waste that is entered into customs territory. Customs set the allowance for steel scrap at its market value. Yet this figure is actually the *dutiable* value of the steel scrap. Making this the allowance results in a gross under-allowance, because the allowance, however calculated, should reflect the difference in value between the non-scrap and the scrap steel.

Moreover, a strictly value-based approach cannot have been intended when Congress referred specifically to both recoverable and irrecoverable waste with no clarifying language. Congress is presumed not to have used superfluous language. See *United States v. J.E. Mamiye & Sons, Inc.*, 665 F.2d 336, 339 (CCPA 1981) (citing *United States v. Avdel Corp.*, 546 F.2d 901 (CCPA 1977)). Yet the reference to irrecoverable waste would serve no purpose if Congress's objective had been simply to subtract the transaction value of any waste produced.

C

We agree with the Court of International Trade that the statute does not explicitly prescribe a method for calculating the allowance for waste. Thus, in determining the meaning of this ambiguous statute, a reasonable interpretation by the agency that implements it is entitled to deference. *Shalala v. Guernsey Memorial Hosp.*, 115 S. Ct. 1232, 1236 (1995); *Chevron*, 467 U.S. at 842-43. However, we disagree with the Court of

International Trade that Customs's approach "produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Statutory interpretation "is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because * * * only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.*

Although legislative history may at times shed light on statutory language, in this case the history of the waste allowance provision is virtually nonexistent. The allowance made its appearance in 1950, when the statute was amended, *inter alia*, to allow manufacturing and other manipulation of merchandise within a zone. Pub. L. No. 81-566, § 1, 64 Stat. 246-47 (1950) (codified as amended at 19 U.S.C. § 81c). The waste allowance was not a focal point of the hearings on the 1950 amendment, however. One of the only explicit references to it came during the hearing before the House Committee on Ways and Means:

In every phase of industrial operation, waste must always be taken into account, whether or not this waste is consumed in the manufacturing process or whether recoverable; if recovered waste is imported, it will be dutiable and taxable in its condition and quantity, and at its weight at the time the waste is taken into account.

Hearing Before the House Comm. on Ways and Means on H.R. 6159 and H.R. 6160, 80th Cong., 2d Sess. 37 (1948) (statement of Mr. L.I. Harvey, Executive General Agent, Bd. of Commissioners, Port of New Orleans). The second clause of this statement found its way into the amended statute virtually unchanged; the first clause, with its admonition that waste "be taken into account," does little to shed light on the statutory language. At any rate, the speaker was testifying before the committee and thus the statement is entitled to little weight, as are the only other statements arguably relevant to the waste allowance. See *Hearing Before the House Comm. on Ways and Means on H.R. 6159 and H.R. 6160*, 80th Cong., 2d Sess. 48 ("A duty, of course, will not be assessed on the materials which go into articles that are subsequently exported or destroyed, or on the materials which are consumed in the manufacturing process.") (statement of Mr. Sterling St. John, Jr., Assistant to the President, New York Foreign-Trade Zones Operators, Inc.); *id.* at 55 ("Merchandise of low standard may be brought into a zone and graded up to meet the exacting requirements of the American consuming public, with all waste eliminated before the payment of duty.") (excerpt from an article in the January 1948 issue of *Pacific Northwest Industry*, by Rep. Homer R. Jones).

Although the legislative history of the waste allowance is not very illuminating, the statutory context and the corresponding regulations do provide some guidance. Section 81c states that recoverable waste "shall be dutiable and taxable in its condition and quantity and at its weight at the time of entry" into customs territory. Under the applicable regulation, the dutiable value of the steel waste is determined by "the price

actually paid or payable to the zone seller in the transaction that caused the recoverable waste or scrap to be transferred from the zone." 19 C.F.R. § 146.65(b)(2). These two mandates, along with the statutorily prescribed method of calculating the pre-allowance dutiable value of the privileged foreign steel, demonstrate how to calculate the maximum amount on which a zone manufacturer could be assessed duties. Any method for calculating the allowance must result in the amount of duty on both privileged steel and nonprivileged steel waste prescribed by the statute and regulations.

Stated in these terms, it is clear that Customs's approach results in an under-allowance, and Goodman's results in an over-allowance. Customs's approach results in an under-allowance because it is the same as assessing duties on \$375.74 worth of scrap steel, even though the scrap is only worth \$81.68. Goodman's approach, in contrast, would treat the scrap for purposes of the allowance as though it were valueless, even though it was sold for \$81.68. Put another way, Customs treats the scrap steel as though it were privileged steel for purposes of the allowance, whereas Goodman treats all of the waste as though it were irrecoverable.

Thus, to reconcile the statutory and regulatory language, the allowance must be the *difference* between the market value of the privileged steel initially brought into the zone and the market value of the steel scrap. This is the only approach consistent with section 81c and 19 C.F.R. § 146.65(b)(2). The calculation would be as follows:

Transaction value of 28,109 pounds of privileged foreign steel	minus	difference between market value of privileged foreign steel and steel scrap	equals	dutiable value of privileged foreign steel
\$4,848.24	-	(\$457.42-\$81.68) \$375.74	=	\$4,472.50

This is essentially equivalent to separating the steel into categories of non-scrap and scrap before contemplating duties. Using the 5.1 percent duty rate results in a duty of \$228.10.⁴

Although the government and *amicus curiae* American Iron and Steel Institute argue that any approach other than Customs's methodology would allow importers to take unfair advantage of foreign-trade zones to the detriment of domestic producers, "the Foreign Trade Zones Act clearly contemplates that trade zone users may take advantage of differing rates in tariff schedules and thereby, depending on what form a product might take when imported from the zone into the United States customs territory, save on customs duties." *ARMCO Steel Corp. v. Stans*, 431 F.2d 779, 784-85 (2d Cir. 1970). As *amicus* National Association of Foreign-Trade Zones points out, foreign-trade zones provide

⁴ Because Goodman's manufacturing process did not produce any irrecoverable waste, the issue of how to calculate the allowance for it is not before us. We note, however, that it is no more difficult to deal with irrecoverable waste than recoverable waste using this approach; because irrecoverable waste by definition has no value, it would be accorded an allowance of full value.

many advantages to manufacturers: duties need not be paid on merchandise that is damaged or otherwise lacking commercial value; and privileged foreign merchandise is dutied at the rate applicable when it enters the zone, thus avoiding payment of duty on the value added within the zone. That the waste allowance may enure to the benefit of importers does not justify construing it so that it has little or no value.

CONCLUSION

Accordingly, the judgment of the Court of International Trade is reversed.

COSTS

Each party shall bear its own costs.

REVERSED

TOTES, INC., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 95-1125

(Decided October 24, 1995)

George W. Thompson, Neville, Peterson & Williams, New York, New York, argued for plaintiff-appellant. With him on the brief were *John M. Peterson* and *Peter J. Allen*.

Amy M. Rubin, Commercial Litigation Branch, Department of Justice, New York, New York, argued for defendant-appellee. With her on the brief were *Frank W. Hunger*, Assistant Attorney General, *David M. Cohen*, Director, and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office. Of counsel was *Laura R. Siegal*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service.

Appealed from: U.S. Court of International Trade.

Judge NEWMAN.

Before ARCHER, *Chief Judge*, NIES, and LOURIE, *Circuit Judges*.

LOURIE, *Circuit Judge*.

Totes, Incorporated appeals from the September 30, 1994 decision of the United States Court of International Trade granting the government's motion for summary judgment and holding that the United States Customs Service properly classified certain imported merchandise under subheading 4202.92.9020 of the Harmonized Tariff Schedule of the United States (1990) ("HTSUS"). *Totes, Inc. v. United States*, 865 F. Supp. 867 (Ct. Int'l Trade 1994). Because the court did not err in granting summary judgment, we affirm.

BACKGROUND

The "Totes Trunk Organizer" is a rectangular case used to organize and store items such as motor oil, tools, and jumper cables in an automo-

bile trunk. The case is made of a liquid-impervious nylon fabric. It has a zippered top opening, two straps at the sides which form handles, and reinforced bottom seams. Velcro strips on the bottom surface allow the case to be secured to a carpeted surface in an automobile trunk. The case's interior may be divided into three discrete storage areas using dividers that snap into place. The exterior of the Trunk Organizer bears the name "totes AUTOMOBILE CLUB." Totes markets the product as part of its Auto Club line of automobile accessories, which also includes windshield ice scrapers, emergency lights, car window shades, and dashboard memo pads.

In November 1990 Totes imported Trunk Organizers from Hong Kong to the United States. Customs classified the merchandise as a "similar container" under subheading 4202.92.9020, HTSUS, subject to a duty rate of 20% *ad valorem*. That subheading covers, with emphasis:

Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of plastic sheeting, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials:

* * * * *

Other:

* * * * *

With outer surface of plastic sheeting or of textile materials:

* * * * *

Other:

* * * * *

Other

With outer surface of textile materials:

* * * * *

Other:

Of man-made fibers.

Totes timely filed a protest against liquidation of the merchandise, which Customs denied. Totes then challenged Customs' classification determination in the United States Court of International Trade, arguing that the product should have been classified as a motor vehicle accessory under HTSUS subheading 8708.99.50. That subheading, which carries a duty rate of 3.1% *ad valorem*, reads in relevant part as follows:

Parts and accessories of the motor vehicles of headings 8701 to 8705:

* * * * *

Other parts and accessories:

* * * * *

Other:

* * * * *

Other:

* * * * *

Other.

Totes and the government cross-moved for summary judgment. Applying the principle of statutory construction known as *ejusdem generis* ("of the same kind"), the court determined that Totes' product served the essential purposes of "organization, holding, storage and protection of articles" similar to the exemplars listed under heading 4202, "especially jewelry boxes and cutlery cases that serve mainly to facilitate an organized separation, protection, storage or holding of jewelry or cutlery * * *." *Totes*, 865 F. Supp. at 872. Thus, the court held that Customs properly classified the product as a "similar container" under subheading 4202.92.9020, HTSUS. The court further determined that the item is excluded from classification under heading 8708 based on the Explanatory Notes to HTSUS Section XVII.¹ The Explanatory Notes state that merchandise is excluded from classification as a part or accessory under any of the headings of Section XVII if the item is more specifically classifiable elsewhere in the HTSUS. Tool bags are listed in the Explanatory Notes as an example of merchandise that is more specifically classifiable under heading 4202 than under any of the headings of Section XVII. Heading 8708 is within Section XVII. The court reasoned, therefore, that items similar to tool bags, such as the Trunk Organizer, are "more specifically classifiable under the provisions for the bags, cases and similar containers in Heading 4202 even if they are principally used as motor vehicle parts or accessories within the purview of Heading 8708." *Id.* at 875. The court granted summary judgment for the government and dismissed the case.

Totes timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5) (1988).

DISCUSSION

We review the Court of International Trade's grant of summary judgment for correctness as a matter of law. *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). The meaning of a tariff classification term is also a question of law, which we review *de novo*. *Id.* Determining whether merchandise comes within a particular tariff provision, as properly interpreted, is a question of fact. *Marcel Watch Co. v. United States*, 11 F.3d 1054, 1056 (Fed. Cir. 1993). Customs' classification determination is, by statute, presumed to be correct. 28 U.S.C. § 2639(a)(1) (1988). Therefore, as the party challenging the classifica-

¹ Customs Co-Operation Council, 4 *Harmonized Commodity Description and Coding System: Explanatory Notes* (1st ed. 1986) ("Explanatory Notes"). HTSUS Section XVII encompasses all tariff headings for "Vehicles, Aircraft, Vessels and Associated Equipment."

tion, Totes bears the burden of proof in this case. See *id.*; see also *Mita Copystar*, 21 F.3d at 1082.

Totes first argues that the Court of International Trade erred in determining that the merchandise is *ejusdem generis* with the exemplars named in subheading 4202.92.9020, HTSUS. Totes contends that the exemplars share the essential purpose or characteristic of being carried on the person or in a handbag, whereas the essential purpose of the Trunk Organizer is not to transport items but to organize and store items in an automobile trunk. Totes insists that, factually and legally, the present case resembles *Sports Graphics, Inc. v. United States*, 24 F.3d 1390 (Fed. Cir. 1994), and that the trial court failed to follow our analysis in that case. The government maintains that the merchandise is *ejusdem generis* with the exemplars named in subheading 4202.92.9020 and thus is classifiable under that subheading. We agree with the government. We have stated that the appropriate analysis for applying the principle of *ejusdem generis* is as follows:

Under the rule of *ejusdem generis*, which means "of the same kind," where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified. As applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* [by name] in order to be classified under the general terms.

Sports Graphics, 24 F.3d at 1392 (citation omitted).

The trial court accordingly determined that Totes' product shares with the containers listed *eo nomine* in subheading 4202.92.9020 the essential characteristics of organizing, storing, protecting, and carrying various items. *Totes*, 865 F. Supp. at 872. We find no error in that determination. Contrary to Totes' contention, the merchandise is not removed from classification under subheading 4202.92.9020 simply because it is intended to organize, store, and protect items associated with a motor vehicle. Many of the containers named in subheading 4202.92.9020 are used to organize, store, and protect specific items. In addition, like many of the containers listed *eo nomine* in subheading 4202.92.9020, the Trunk Organizer has straps that allow it to be carried; thus, Totes' distinction concerning portability is unpersuasive. Accordingly, we find no error in the court's determination that Customs correctly found that the merchandise is covered by the "similar containers" term in subheading 4202.92.9020, HTSUS.

Contrary to Totes' view, our decision in *Sports Graphics* does not compel a different result. In that case, the merchandise at issue ("Chill" coolers) consisted of soft-sided nylon containers having foam insulation, a zippered top, and carrying straps. The Court of International Trade held that under the Tariff Schedule of the United States ("TSUS"), the coolers were "[a]rticles chiefly used for preparing, serving, or storing food or beverages" under item 772.15, TSUS, rather than "other" articles of luggage under item 706.62, TSUS. *Sports Graphics*, 24 F.3d at

1391. On appeal, the government argued that, based on its storage capacity, the merchandise was *ejusdem generis* with the luggage articles named in item 706.62, TSUS. We disagreed, finding no error in the trial court's determination that the essential purpose of the coolers was to store food or beverages in a cold environment for a period of time. *Id.* at 1392-93. We held that "the merchandise [had] a different purpose, the storage of food or beverage, which preclude[d] the merchandise from being *ejusdem generis* with the exemplars listed in the * * * luggage provision." *Id.* at 1393. Moreover, the specific use for food was predominant over the more general description as luggage. Therefore, we affirmed the trial court's determination that the coolers were classifiable as items for storing food or beverages under item 772.15, TSUS, and were not classifiable as luggage under item 706.62, TSUS. *Id.* at 1394.

In the present case, similarly, the more specific description as a "similar container" predominates over the more general description as an "accessory" of a motor vehicle. Thus, *Sports Graphics* is not to the contrary and the trial court did not err in classifying the Trunk Organizer under subheading 4202.92.9020.

Totes next argues that the merchandise is *prima facie* classifiable under subheading 8708.99.50, HTSUS, directed to "other" parts and accessories of motor vehicles. Totes further argues that, assuming that the merchandise is *prima facie* classifiable under both subheadings 4202.92.9020 and 8708.99.50, the trial court should have applied the General Rules of Interpretation² to classify the merchandise under the more specific provision for motor vehicle parts and accessories. Totes contends that, in determining which of two equally descriptive tariff provisions more specifically describes merchandise, courts have held that "use" provisions are more specific than *eo nomine* provisions, absent contrary legislative intent.³ Subheading 8708.99.50 is a use provision; subheading 4202.92.9020 is an *eo nomine* provision. Thus, Totes argues, the court should have determined that subheading 8708.99.50 more specifically describes the merchandise than subheading 4202.92.9020.

In response, the government does not dispute that the merchandise is *prima facie* classifiable under both subheadings, but argues that the court correctly determined that the Explanatory Notes indicate that the merchandise is more specifically classifiable under subheading 4202.92.9020, HTSUS. Thus, each side argues the greater specificity rule. After evaluating both arguments, we agree with the government.

² Rule 3(a) of the General Rules of Interpretation ("GRI") of the HTSUS provides:

3. When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description* * *.

³ For instance, in *E.M. Chemicals v. United States*, 920 F.2d 910, 915-16, 9 Fed. Cir. (T) 33, 40-41 (1990), we stated: One of our predecessor courts has established the principle that, when two or more tariff categories are equally descriptive of an item, one that describes a use governs over one which describes the composition of the item. See *United States v. Siemens America, Inc.*, 653 F.2d 471, 478, 68 CCPA 62, (70) (CCPA 1981) ("[I]n the absence of legislative intent to the contrary, a product described by both a use provision and an *eo nomine* provision is generally more specifically provided for under the use provision").

The competing provisions here are not equal. The tariff provision for "similar containers" more specifically describes the merchandise than the competing provision for "other accessories" of motor vehicles. "Containers," which essentially have the one principal function of containing, even though encompassing a wide variety thereof, is a more specific term than "accessory," which can include a wide variety of items having many different functions.

Moreover, the Explanatory Notes to HTSUS Section XVII implement this concept and provide as follows:

(C) Parts and accessories covered more specifically elsewhere in the Nomenclature.

Parts and accessories, even if identifiable as for the articles of [Section XVII], are **excluded** if they are covered more specifically by another heading elsewhere in the Nomenclature, e.g.:

- (1) Profile shapes of vulcanised rubber other than hard rubber, whether or not cut to length (**heading 40.08**).
- (2) Transmission belts of vulcanised rubber (**heading 40.10**).
- (3) Rubber tyres, interchangeable tyre treads, tyre flaps and inner tubes (**headings 40.11 to 40.13**).
- (4) Tool bags of leather or of composition leather, of vulcanised fibre, etc. (**heading 42.02**).
- (5) Bicycle or balloon nets (**heading 56.08**).
- (6) Towing ropes (**heading 56.09**).
- (7) Textile carpets (**Chapter 57**).
- (8) Unframed safety glass consisting of toughened or laminated glass, whether or not shaped (**heading 70.07**).
- (9) Rear-view mirrors (**heading 70.09** or **Chapter 90**—see the corresponding Explanatory Notes).
- (10) Unframed glass for vehicle headlamps (**heading 70.14**) and, in general, the goods of **Chapter 70**.
- (11) Flexible shafts for speed indicators, revolution counters, etc. (**heading 84.83**).
- (12) Vehicle seats of **heading 94.01**.

Explanatory Notes, Section XVII, General Note III(C) (emphasis added to item (4)).

According to the Note, parts and accessories that are more specifically described outside of HTSUS Section XVII should be classified under the other, more specific provision. Tool bags are listed as an *example* of an item that is more specifically described by heading 4202 than any of the headings in Section XVII. Heading 8708 is in Section XVII. We agree with the trial court that the "e.g." preceding the listed examples in the Note indicates that containers *similar* to tool bags, such as the Trunk Organizer, are more specifically described by heading 4202 than any of the headings in Section XVII, including heading 8708. We therefore hold that the trial court did not err in determining that HTSUS subheading 4202.92.9020 more specifically describes the merchandise than subheading 8708.99.50.

Totes contends that the relevant Explanatory Note only restates the rule of relative specificity, and that the court erred in relying on the Note

to determine which of the competing provisions is more specific. The court, Totes further argues, should have resolved the relative specificity question by applying the principle that "use" provisions generally are more specific than *eo nomine* provisions. See, e.g., *E.M. Chemicals v. United States*, 920 F.2d 910, 9 Fed. Cir. (T) 33 (1990) (holding that imported liquid crystals were more specifically described by a "use" tariff provision than a competing provision describing their chemical composition). We disagree.

It is true that the "Explanatory Notes are only instructive and are not dispositive or binding." *Marubeni Am. Corp. v. United States*, 35 F.3d 530, 535 n.3 (Fed. Cir. 1994). However, while the Explanatory Notes "do not constitute controlling legislative history[, they] nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings." *Mita Copystar*, 21 F.3d at 1082. We therefore find no error in the court's use of the Explanatory Notes as an interpretive aid. Moreover, because the merchandise is more specifically described by HTSUS subheading 4202.92.9020 than subheading 8708.99.50, as noted above, there are not two competing tariff provisions that "equally" describe the merchandise. See *E.M. Chems.*, 920 F.2d at 916, 9 Fed. Cir. (T) at 40. Thus, the trial court properly declined to apply the principle that use tariff categories generally more specifically describe merchandise than *eo nomine* provisions. See *id.* at 915-16, 9 Fed. Cir. (T) at 40-41; see also *United States v. Electrolux Corp.*, 46 CCPA 143, 147 (1959) (principle that use provisions generally govern over *eo nomine* provisions is not a strict rule, but "a convenient rule of thumb for resolving issues where the competing provisions are otherwise in balance").

In sum, we find no error in the trial court's determination that the merchandise shares the essential characteristics of the exemplars named in subheading 4202.92.9020, HTSUS, and thus is classifiable under that subheading. We also find no error in the court's determination that the merchandise is more specifically classifiable under subheading 4202.92.9020 than subheading 8708.99.50.

CONCLUSION

The Court of International Trade correctly interpreted the HTSUS in determining that the merchandise is properly classified under subheading 4202.92.9020, HTSUS, and is not classifiable under subheading 8708.99.50, HTSUS. We therefore affirm the court's decision dismissing the case.

AFFIRMED

TORRINGTON CO., PLAINTIFF-APPELLANT, AND FEDERAL-MOGUL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT-APPELLEE, AND SKF USA INC. AND SKF GMBH, DEFENDANT-APPELLEES, AND NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, DEFENDANT-APPELLEE, AND INA WALZLAGER SCHAEFFLER KG AND INA BEARING CO., INC., DEFENDANT-APPELLEES, AND FAG KUGELFISCHER GEORG SCHAFER KGAA, DEFENDANT-APPELLEE

Appeal No. 95-1134

TORRINGTON CO., PLAINTIFF-APPELLANT, AND FEDERAL-MOGUL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT-APPELLEE, AND SKF USA INC. AND SKF INDUSTRIE, S.P.A., DEFENDANT-APPELLEES, AND FAG CUSCINETTI S.P.A., DEFENDANT-APPELLEE

Appeal No. 95-1135

(Decided October 24, 1995)

Wesley K. Caine, Stewart & Stewart, of Washington, DC, argued for plaintiff-appellant in appeal nos. 95-1134 and 95-1135. With him on the brief were *Terence P. Stewart*, *Geert DePrest* and *Lane S. Hurewitz*. Of counsel was *James R. Cannon, Jr.*

Velta A. Melnbrensis, Assistant Director, Commercial Litigation Branch, Department of Justice, of Washington, DC, argued for defendants-appellees, The United States, in appeal nos. 95-1134 and 95-1135. With her on the brief were *Frank W. Hunger*, Assistant Attorney General and *David M. Cohen*, Director. Also on the brief were *Stephen J. Powell*, Chief Counsel for Import Administration, *Berniece A. Browne*, Senior Counsel, *Thomas H. Fine* and *Dean A. Pinkert*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce. *Herbert C. Shelley*, Howrey & Simon, of Washington, DC, argued for defendants-appellees, SKF USA Inc. and SKF GmbH, in appeal no. 95-1134. With him on the brief was *Alice A. Kipel*. *Stephen L. Gibson*, Arent Fox Kintner Plotkin & Kahn, of Washington, DC, argued for defendants-appellees, INA Walzlager Schaeffler KG and INA Bearing Company, Inc., in appeal no. 95-1134. With him on the brief was *Peter L. Sultan*.

Max F. Schutzman, Grunfeld, Desiderio, Lebowitz & Silverman, LLP, of New York, New York, argued for defendant-appellee, FAG Kugelfischer Georg Schafer KGaA, in appeal no. 95-1134 and FAG Cuscinetti S.p.A., in appeal no. 95-1135. With him on the brief were *Andrew B. Schroth* and *Mark E. Pardo*. Of counsel were *David L. Simon* and *Jeffrey S. Grimson*.

Donald J. Unger, *Lawrence M. Friedman* and *Kazumune V. Kans*, Barnes, Richardson & Colburn, of Chicago, Illinois, were on the brief for defendant-appellee, NTN Kugellagerfabrik (Deutschland) GmbH, in appeal no. 95-1134.

Appealed from: U.S. Court of International Trade.

Judge TSOUALAS.

Before ARCHER, Chief Judge, PLAGER and BRYSON, Circuit Judges.

BRYSON, Circuit Judge.

These consolidated cases present two questions of statutory interpretation arising out of an administrative review of antidumping duty orders. The first question concerns what constitutes "good cause," within the meaning of 19 U.S.C. § 1677e(b)(3)(B) (1988), to require the Commerce Department to verify the information it relied on in conducting the administrative review. The second question is whether the Commerce Department may lawfully reduce the potential antidumping

duties on goods imported into this country by taking into account pre-sale transportation expenses associated with the sale of like goods in the manufacturers' home markets. We conclude that the Court of International Trade correctly resolved both questions, and we therefore affirm.

I

In 1990, the International Trade Administration of the Commerce Department (Commerce) initiated administrative reviews of antidumping duty orders covering antifriction bearings from Germany and Italy. The Torrington Company, an American manufacturer of antifriction bearings, filed requests that Commerce verify all information upon which it would base its determinations in those reviews. In response to questionnaires from Commerce, the foreign companies that were subject to the reviews submitted information regarding their production costs for the imported bearings. Torrington then filed objections to the companies' responses, arguing *inter alia* that several of the companies had changed their cost accounting systems for the purpose of antidumping reporting.

Commerce originally scheduled on-site verifications for several of the companies. It subsequently canceled the verifications, however, citing as one factor the outbreak of the Persian Gulf War, which had made European air travel less safe for Commerce Department personnel. Torrington objected to the cancellations and suggested that Commerce postpone the verifications until after air travel was safer or, in the alternative, that it conduct verification of the pertinent data in Washington, DC. Commerce declined to pursue either option, stating that it was satisfied with the responses it had received.

Torrington filed complaints in the Court of International Trade, challenging Commerce's failure to conduct the verifications. In addition, Torrington argued that it was improper for Commerce to deduct an importer's pre-sale home-market transportation expenses from the calculation of foreign market value, a key element in determining the antidumping duty.

The Court of International Trade affirmed Commerce on both questions but remanded to the agency on other issues. *Torrington Co. v. United States*, 832 F. Supp. 365 (Ct. Int'l Trade 1993) (Italy); *Torrington Co. v. United States*, 832 F. Supp. 379 (Ct. Int'l Trade 1993) (Germany). Following the proceedings on remand, Torrington asked the Court of International Trade to reconsider its ruling on pre-sale home-market transportation expenses in light of this court's intervening decision in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398 (Fed. Cir.), cert. denied, 115 S. Ct. 67 (1994) ("*Ad Hoc I*"). The court declined to do so, holding that *Ad Hoc I* did not address the question presented in this case. *Torrington Co. v. United States*, 850 F. Supp. 7 (Ct. Int'l Trade 1994) (Italy); *Torrington Co. v. United States*, 850 F. Supp. 12 (Ct. Int'l Trade 1994) (Germany). After a further remand for clarification of Commerce's policy on home-market transportation expenses, the Court of International Trade once again

upheld Commerce's treatment of those expenses. *Torrington Co. v. United States*, 866 F. Supp. 581 (Ct. Int'l Trade 1994) (Germany); *Torrington Co. v. United States*, 866 F. Supp. 1434 (Ct. Int'l Trade 1994) (Italy).

Torrington took this appeal. It contends that the Court of International Trade erred in upholding Commerce's decision not to conduct verifications and in allowing Commerce to deduct pre-sale home-market transportation expenses from the calculation of foreign market value.

II

The statute on which Torrington relies for its claim that Commerce was obligated to conduct the verifications is 19 U.S.C. § 1677e(b) (1988). That statute provides that upon receiving a request from an interested party, Commerce must verify the information on which it relies in an administrative review if either (1) the two immediately preceding administrative reviews were conducted without verification, or (2) "good cause for verification is shown." 19 U.S.C. § 1677e(b)(3)(B) (1988).

Because these were the first administrative reviews of the antidumping duty orders for antifriction bearings, verification was not required unless there was a showing of "good cause for verification" within the meaning of section 1677e(b)(3)(B). Torrington argues that the "good cause" standard set forth in the statute is an objective one and that the standard was met in this case. Commerce, however, has promulgated a regulation that interprets the "good cause" standard as subjective. The pertinent regulation, found at 19 C.F.R. § 353.36(a)(iv), states that the "Secretary will verify all factual information the Secretary relies on in * * * [t]he final results of an administrative review * * * if the Secretary decides that good cause for verification exists." In order to prevail on its view that the "good cause" standard is objective, Torrington must establish that the regulation is contrary to the terms of the statute and therefore beyond the Department's power to adopt.

When we review a regulation that the Commerce Department has promulgated in interpreting the antidumping laws, the first question is whether Congress has spoken to the precise question at issue. See *Torrington Co. v. United States*, 44 F.3d 1572, 1577 (Fed. Cir. 1995); *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1571 (Fed. Cir. 1994); see generally *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Nothing in the language of the statute addresses the question whether the "good cause" standard is subjective or objective. Nor is there anything in the legislative history that supports Torrington's claim that Congress intended to create an objective test for "good cause."

Torrington cites one piece of legislative history—a House report commenting that "[g]ood cause could be such factors as a significant issue of law or fact, changed or special circumstances, discrepancies found in previous verifications, or the likelihood of a significant impact on the

result." H.R. Rep. No. 725, 98th Cong., 2d Sess. 43 (1984). That report, however, does not speak in objective or mandatory terms; it merely lists some factors that could constitute "good cause."

In the absence of clear direction from the statute, we must ask the second question: whether the Commerce Department's regulation is based on a permissible interpretation of the statute. See *Chevron*, 467 U.S. at 843 & n.11, 844; *Suramerica De Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992). In antidumping cases, we accord substantial deference to Commerce's statutory interpretation, as the International Trade Administration is the "master" of the antidumping laws. *Daewoo Elecs. Co. v. International Union*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), cert. denied, 114 S. Ct. 2672 (1994); see also *Koyo Seiko Co. v. United States*, No. 94-1363 (Fed. Cir. Sept. 20, 1995), slip op. 10-13; *Timken Co. v. United States*, 37 F.3d 1470, 1474 (Fed. Cir. 1994); *Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1039, 3 Fed. Cir. (T) 83, 90 (1985).

The Commerce Department's determination that the Secretary retains substantial discretion in deciding when "good cause" for verification is shown is a permissible interpretation of section 1677e(b)(3)(B), particularly in light of the general principle that agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Accepting Torrington's construction of the statute would put the Court of International Trade and this court in the position of routinely second-guessing the Secretary's decisions regarding whether to conduct verification in particular cases, a role for which courts are ill-suited and one that could be quite disruptive of Commerce's effort to establish enforcement priorities.

In light of Commerce's construction of the statute, the verification issue turns on whether Commerce abused its discretion by canceling the verifications for the foreign companies, that is, whether Commerce's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). On the record in this case, we conclude that Commerce considered the relevant factors and did not commit a clear error of judgment.

In explaining its decision to cancel the verifications, Commerce stated that it looked at many factors and that "[a]mong the Department's considerations were the volume and significance of a particular firm's shipments from the country under review, as well as our evaluation of the credibility of the data submitted by that firm in the context of the review under consideration." *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 56 Fed. Reg. 31,692, at 31,740 (Dep't Comm. 1991) (final results). Commerce further explained that in light of its evaluation of the information from the companies that it had examined, "the fact that a particular firm may have modified its cost system prior to the start of

these reviews is not an overriding consideration." *Id.* Finally, Commerce noted that, "given the large number of firms involved in these reviews and the time, resources and other constraints of the Department, total verification was not possible." *Id.*

Commerce must necessarily take many factors into account in determining which administrative review proceedings call for verification. Under the subjective "good cause" standard, the Secretary is entitled to weigh the need for verification in a particular case against the burden that verification would impose on agency resources. In this case, the Secretary determined that the need for verification was not great and that the burden would be substantial. Although Torrington questions the Secretary's decision on the question of need, we are not prepared to find that the Secretary's considered determination of that issue constituted a clear error of judgment.

Moreover, contrary to Torrington's submission, there is no *per se* rule requiring Commerce to go through with scheduled verifications once it has announced an intention to conduct verifications in a particular case. The agency may revisit the question whether good cause has been shown for verification, just as it may alter its assessment of any other matter falling within its discretion to decide.

Finally, because it was not improper for Commerce to cancel the verifications, it was lawful for Commerce not to resort to a compromise option, such as conducting off-site verifications in Washington, DC. We therefore uphold the decision of the Court of International Trade on the verification issue.

III

A

Resolution of the pre-sale home-market transportation issue requires an understanding of the antidumping statute. The entire statutory scheme was recently overhauled by the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (URAA). The URAA, however, does not apply to administrative reviews initiated prior to January 1, 1995. *See* URAA § 291(a)(2), (b). In the case at bar, therefore, we construe the version of the statute that preceded the URAA.

The purpose underlying the antidumping laws is to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States at less than "fair value," *i.e.*, at prices below the prices the foreign manufacturers charge for the same products in their home markets. If the International Trade Commission determines that a domestic industry may be materially injured or retarded by the importation of particular goods, and the price of those imported goods sold in the United States (referred to as "United States price," 19 U.S.C. § 1677a (1988)) is less than the price of the same goods sold in the manufacturer's home market (referred to as "foreign market value," 19 U.S.C. § 1677b (1988)), antidumping duties will be assessed in the amount of the difference. 19 U.S.C. § 1673 (1988).

The antidumping statutes define United States price by reference to either "purchase price" or "exporter's sales price," whichever is appropriate to the manufacturer's marketing system. 19 U.S.C. § 1677a(a) (1988). "Purchase price" is the price at which a foreign manufacturer sells goods to an independent importer. 19 U.S.C. § 1677a(b) (1988). "Exporter's sales price," which is used in place of purchase price when the foreign manufacturer makes sales in this country through a related importer or distributor, is the price at which the manufacturer's agent sells products to independent purchasers in the United States. See *Torrington Co.*, 44 F.3d at 1575. The purpose of using either purchase price or exporter's sales price, as appropriate, is to ensure that the United States price reflects the price at which the goods are sold in an arm's length transaction, "whether the goods traveled through a related importer or through an unrelated, independent importer." *Smith-Corona Group v. United States*, 713 F.2d 1568, 1572, 1 Fed. Cir. (T) 130, 133 (1983), *cert. denied*, 465 U.S. 1022 (1984).

On the other side of the antidumping duty ledger, Commerce calculates foreign market value by using one of several methods. The method used in this case was to review home-market sales to determine the market price of the same or similar products in the manufacturer's home market. See 19 U.S.C. § 1677b(a)(1) (1988).

In general, the antidumping statutes seek to produce a fair, "apples-to-apples" comparison between foreign market value and United States price; to achieve that end, the statutes and Commerce Department regulations call for adjustments to the base value of both foreign market value and United States price to permit comparison of the two prices at a similar point in the chain of commerce. See *Koyo Seiko*, 36 F.3d at 1568; *Smith-Corona*, 713 F.2d at 1571-72, 1 Fed. Cir. (T) at 132-33. For example, when the United States price is calculated on the basis of the exporter's sales price, the United States price may be artificially high (compared to the United States price that would be produced by the "purchase price" method of calculation), because the exporter and its related affiliates will have generated expenses before selling the goods to an unrelated party in the United States. The statute therefore requires that, when the United States price is derived from the exporter's sales price, the United States price shall be adjusted by deducting all expenses incurred in selling the merchandise in the United States. See 19 U.S.C. § 1677a(e) (1988).

That deduction, however, can have the effect of artificially depressing the United States price below the foreign market value (and thereby creating antidumping duties), because the home-market price on which the foreign market value is based will necessarily reflect some home-market selling expenses. Commerce has dealt with that problem in two ways. First, it deducts direct selling expenses (*i.e.*, expenses related to a particular sale) in the manufacturer's home market from foreign market value under the "circumstances-of-sale" provision, 19 U.S.C. § 1677b(a)(4)(B) (1988), which broadly authorizes Commerce to adjust

foreign market value "if it is established to the satisfaction of [Commerce] that the amount of any difference between the United States price and the foreign market value" is due to "differences in circumstances of sale." See also 19 C.F.R. § 353.56(a). Second, it deducts indirect selling expenses (*i.e.*, expenses not related to a particular sale) from foreign market value when United States price is calculated based on exporter's sales price. That deduction, which is provided for by regulation, 19 C.F.R. § 353.56(b)(2), is known as the exporter's sales price offset (or ESP offset). The regulation further provides, however, that the ESP offset may not exceed the amount of the deduction from United States price for indirect selling expenses. That limitation on the deduction from foreign market value for indirect selling expenses is referred to as the ESP offset cap. Commerce's authority to promulgate the ESP offset and ESP offset cap is well settled. See *Smith-Corona*, 713 F.2d at 1579, 1 Fed. Cir. (T) at 141; *Consumer Prods. Div., SCM Corp.*, 753 F.2d at 1040, 3 Fed. Cir. (T) at 92; *Koyo Seiko*, 36 F.3d at 1574; *Torrington Co.*, 44 F.3d at 1579-80.

B

The practical problem at the core of this case is that some foreign producers ship goods from the factory to a warehouse or distribution center before shipping them to their home-market customers. When goods are shipped directly from the factory to the customer after a sale is made, or when goods are shipped to a warehouse for temporary storage following a sale, the post-sale transportation costs are treated as direct selling expenses. What is more problematical is how to deal with the foreign producers' pre-sale transportation costs, such as the costs of shipping goods to the warehouse when the goods are held in the warehouse in anticipation of later sale.

By statute, Commerce is required to deduct from the United States price all expenses incident to bringing goods from the place of shipment in the country of origin to the United States, regardless of whether the calculation of United States price is based on purchase price or exporter's sales price. See 19 U.S.C. § 1677a(d)(2)(A) (1988). The statute does not direct that a corresponding deduction be made from foreign market value for home-market transportation expenses. In calculating United States price, Commerce treats the "place of shipment" as the factory where the goods are produced. See U.S. Dep't of Commerce, *Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change* 30 (Nov. 1985); *Red Raspberries From Canada*, 56 Fed. Reg. 677 (Dep't Comm. 1991) (final results). As a result, while United States price is calculated by deducting all expenses incurred after the goods leave the factory, the unadjusted foreign market value is not calculated in an equivalent manner, but includes the expenses of transporting the goods in connection with home market sales. *Nihon Cement Co. v. United States*, 17 Ct. Int'l Trade 400, 414-15 (1993).

Before the *Ad Hoc I* case, Commerce developed a scheme for addressing that disparity in treatment. It first divided all home-market trans-

portation expenses into post-sale expenses and pre-sale expenses. It then deducted post-sale home-market transportation expenses from foreign market value under the statutory circumstances-of-sale provision, 19 U.S.C. § 1677b(a)(4)(B) (1988). Pre-sale transportation expenses were regarded as indirect selling expenses, and were therefore deductible from foreign market value under the ESP offset when United States price was calculated on the basis of exporter's sales price. See *Ad Hoc I*, 13 F.3d at 400; *Sharp Corp. v. United States*, No. 94-1412 (Fed. Cir. Aug. 11, 1995), slip op. 9. In purchase price transactions, however, Commerce refused to deduct pre-sale home-market transportation expenses. See *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 787 F. Supp. 208, 211-12 n.3 (Ct. Int'l Trade 1992).

In the administrative proceeding that led to the decision in *Ad Hoc I*, Commerce announced a change in its treatment of pre-sale home-market transportation expenses. The Department began deducting those expenses directly from foreign market value, without restricting the deductions to exporter's sales price transactions and without limiting the amount of the deductions to the amount permitted under the ESP offset cap. See *Gray Portland Cement and Clinker from Mexico*, 55 Fed. Reg. 29,245, at 29,251 (Dep't Comm. 1990) (final determination). In so doing, Commerce did not rely on any statutory provision or regulation, but instead made the deductions under what Commerce has referred to as its "inherent power to fill in gaps in the antidumping statute." *The Torrington Company* (Dep't Comm. June 23, 1994) (final results); see also *Tapered Roller Bearings From Japan*, 56 Fed. Reg. 26,054, at 26,056 (Dep't Comm. 1991) (final admin. review).

In *Ad Hoc I*, this court was presented with a challenge to Commerce's new practice of deducting pre-sale home-market transportation expenses from foreign market value in purchase price transactions. The court struck down the practice, holding that Commerce had acted beyond its power when it used its supposed "gap-filling authority" to deduct pre-sale home-market transportation expenses from foreign market value in that setting. 13 F.3d at 400, 403.

Following the decision in *Ad Hoc I*, Commerce once again modified its method of treating pre-sale home-market transportation expenses. Under its current approach, Commerce continues to rely on the statutory circumstances-of-sale provision to deduct direct home-market transportation expenses from foreign market value, regardless of whether United States price is calculated on the basis of purchase price or exporter's sales price. Indirect home-market transportation expenses are treated differently depending on whether United States price is derived from purchase price or exporter's sales price. If United States price is based on purchase price, Commerce does not deduct indirect home-market transportation expenses at all. If United States price is based on exporter's sales price, however, Commerce has reverted to its prior practice of characterizing indirect home-market transportation

expenses as indirect selling expenses, which are deductible under the ESP offset up to the maximum allowed by the ESP offset cap. In addition, Commerce has modified somewhat the distinction it draws between direct and indirect transportation expenses. Where Commerce had previously defined all post-sale transportation expenses as direct and all pre-sale transportation expenses as indirect, Commerce has now adopted a more flexible test, under which expenses are treated as direct if they are related to a particular sale and indirect if they are not. Thus, even pre-sale transportation expenses may be considered direct if they are related to home-market sales of the particular goods in question.

Before the Court of International Trade, Torrington argued that Commerce's new practice violates *Ad Hoc I*. In particular, Torrington argued that Commerce could not avoid the impact of *Ad Hoc I* by treating it as limited to purchase price transactions and continuing to deduct pre-sale home-market expenses in cases in which United States price is based on exporter's sales price. The court disagreed; it concluded that *Ad Hoc I* addressed only purchase price transactions and that the court's holding was limited to rejecting Commerce's use of its supposed "gap-filling" authority to deduct pre-sale home-market transportation expenses from foreign market value when United States price was calculated on a purchase price basis.

In this court, Torrington continues to press its broad interpretation of *Ad Hoc I*. In Torrington's view, *Ad Hoc I* stands for the proposition that Commerce may not under any circumstances adjust foreign market value by deducting pre-sale home-market transportation expenses. While the court's opinion in *Ad Hoc I* contains language that could support a more general application, we do not agree that *Ad Hoc I* should be read as broadly as Torrington urges. In fact, Torrington's interpretation ignores language in *Ad Hoc I* that counsels in favor of reading that decision narrowly.

The court in *Ad Hoc I* described Commerce's traditional treatment of home-market transportation expenses. It specifically noted, without apparent disapproval, the Department's prior practice of deducting pre-sale home-market transportation expenses when United States price was based on exporter's sales price. The court then distinguished that practice from the new practice Commerce had adopted in that case:

Pre-sale transportation expenses [under prior practice] were treated as "indirect expenses," deductible from [foreign market value] only when [exporter's sales price] was used as the basis for the United States price * * *. In the case at bar, however, Commerce altered this practice and deducted pre-sale inland freight expenses while conducting a purchase price, rather than the exporter's sale price, comparison.

13 F.3d at 400-01. The court further noted that Commerce had not relied on the statutory circumstances-of-sale provision to support its newly devised adjustment to foreign market value; for that reason the

court declined to rule on whether Commerce's actions might be justified under that provision. See *id.* at 400-01 & n.8.

The court's references to the circumstances-of-sale provision and to Commerce's prior practice of treating pre-sale home-market transportation expenses as indirect selling expenses under the ESP offset support the government's view that *Ad Hoc I* was not intended to speak broadly to the question whether pre-sale transportation expenses can be deducted from foreign market value under any circumstances. In *Ad Hoc I*, Commerce deducted indirect expenses from foreign market value in the purchase price setting without invoking any express statutory or regulatory support. In this case, by contrast, Commerce relies on the ESP offset, a regulation that has been used for years to deduct indirect selling expenses (including pre-sale home-market transportation expenses) from foreign market value in exporter's sales price transactions. To extend *Ad Hoc I* to exporter's sales price transactions thus not only would ignore the limiting language in *Ad Hoc I* itself, but would overturn a longstanding administrative practice under the ESP offset regulation.

Extending *Ad Hoc I* to exporter's sales price transactions, as Tarrington urges, would also bring that decision into tension with prior precedents of this court, in particular the decision in *Smith-Corona*. In that case, the court stated that "[i]n view of the discretion accorded the Secretary under the statute to make adjustments to foreign market value, we conclude that the exporter's sales price offset * * * is a proper and reasonable exercise of the Secretary's authority to administer the statute fairly." 713 F.2d at 1579, 1 Fed. Cir. (T) at 141. To be sure, *Smith-Corona* did not explicitly endorse the application of the ESP offset to pre-sale home-market transportation expenses. Nonetheless, Commerce has broad authority to construe its own regulations, see *Sharp Corp. v. United States*, *supra*, slip op. 7, and we think it entirely reasonable for Commerce to interpret the term "indirect selling expenses" in the ESP offset regulation to include indirect home-market transportation expenses. Moreover, in light of the "considerable deference" that this Court accords to Commerce's construction of the antidumping laws, see *Daewoo Elecs. Co., supra*, 6 F.3d at 1516, we accept Commerce's conclusion that nothing in the United States price section of the statute, 19 U.S.C. § 1677a, prohibits the deduction of indirect home market transportation expenses from foreign market value under the ESP offset regulation. Because the ESP offset regulation is an authorized exercise of the discretion granted to the Secretary under the statutory circumstances-of-sale provision, see *Smith-Corona*, 713 F.2d at 1579, 1 Fed. Cir. (T) at 141; *Brother Indus., Ltd. v. United States*, 540 F. Supp. 1341, 1355-59 (Ct. Int'l Trade 1982), this is not a case in which, as in *Ad Hoc I*, Commerce can be said to have acted without statutory support to negate the impact of a specific provision of the United States price provision of the antidumping laws.

In sum, we conclude that this case is more akin to *Smith-Corona* than it is to *Ad Hoc I*. Under the rationale of *Smith-Corona*, Commerce may deduct indirect selling expenses, including indirect transportation expenses, from foreign market value under the ESP offset. The Court of International Trade therefore properly upheld Commerce's decision to deduct indirect home-market transportation expenses from foreign market value in cases in which United States price is calculated on the basis of exporter's sales price, to the extent allowable under the ESP offset cap.

C

As noted, in its current treatment of transportation expenses Commerce has recharacterized the distinction between direct and indirect expenses. Rather than treating all post-sale transportation expenses as direct and all pre-sale transportation expenses as indirect, Commerce now looks to whether the expenses are directly related to particular home-market sales. As a result, some pre-sale transportation expenses are now regarded as direct and are deducted from foreign market value under the statutory circumstances-of-sale provision. Torrington contends that *Ad Hoc I* bars Commerce from characterizing pre-sale transportation expenses as direct and deducting them under the circumstances-of-sale provision, but our analysis of *Ad Hoc I* above leads us to reject that argument as well.

Nothing in the antidumping statute requires that Commerce rigidly classify post-sale expenses as direct and pre-sale expenses as indirect. In fact, the statute makes no reference to "direct" and "indirect" expenses at all, just as it makes no reference to "pre-sale" or "post-sale" expenses. In its regulations, Commerce uses the term "direct" selling expenses, or expenses "which bear a direct relationship to the sales compared," to describe those expenses that Commerce regards as directly deductible under the statutory circumstances-of-sale provision. See 19 C.F.R. § 353.56(a)(1). Those "direct" expenses are distinguished in the regulations from indirect or "other" selling expenses that are deductible, if at all, only under other provisions, such as the ESP offset. We conclude that in refining the administrative definition of "direct" expenses, it was reasonable for Commerce to dispense with its prior, rigid distinction between pre-sale and post-sale expenses in favor of a more flexible rule that asks whether the expenses in question are directly related to a particular sale. Although Commerce explains that most pre-sale transportation expenses will continue to be characterized as indirect, pre-sale expenses will be deemed direct if they can be shown to relate to the particular sale under consideration. We therefore reject Torrington's challenge to Commerce's classification of certain pre-sale expenses as direct.

Because Torrington has not challenged the specific methodology that Commerce has chosen for determining whether particular pre-sale expenses are direct or indirect, we need not address whether that methodology, which calls for tying the characterization of transportation expenses to the characterization of the related warehousing expenses, is within Commerce's power to adopt. It is enough for present purposes to conclude that Commerce was not required to adhere to its former distinction between pre-sale and post-sale expenses for purposes of applying the circumstances-of-sale provision.

AFFIRMED

Index

Customs Bulletin and Decisions
Vol. 29, No. 45, November 8, 1995

U.S. Customs Service

Treasury Decisions

	T.D. No.	Page
Belize added to list of nations entitled to special tonnage tax exemption; final rule; part 4, CR amended	95-88	6
ITC exclusion orders, U.S. Customs authorized to enforce; final rule; part 12, CR amended	95-87	1

General Notices

CUSTOMS RULINGS LETTERS

Country of origin marking:		Page
Revocation:		
Disallowing container marking exception		9
Tariff classification:		
Proposed modification; solicitation of comments:		
Color upgrade kit for computer printer		13
Proposed revocation; solicitation of comments:		
Electronic card assemblies		18

U.S. Court of Appeals for the Federal Circuit

	Appeal No.	Page
Goodman Manufacturing, L.P. v. United States	94-1477	23
Torrington Co. v. United States	95-1134	38
Totes, Inc. v. United States	95-1125	31

